Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1998

JOHN MICHAEL BATES,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

Petition For A Writ Of Certiorari
To The Arkansas Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Was evidence seized as a result of a warrantless traffic stop introduced in violation of the Fourth Amendment?

2. Was the Fourteenth Amendment Due Process Clause violated in that no rational trier of fact could have found guilt beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

The Petitioner John Michael Bates is a citizen of the state of Arkansas. The Respondent is the State of Arkansas.

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Petitioner, John Michael Bates, petitions for a writ of certiorari to review the September 23, 1998, Opinion of the Arkansas Court of Appeals which affirmed the conviction of felonious possession of methamphetamine, Circuit Court of Fulton County, Arkansas, November 12, 1997. John Michael Bates was convicted of felonious possession of methamphetamine and also misdemeanor possession of marijuana. He was fined $10,000 by the jury with respect to the methamphetamine conviction and was sentenced by the jury to 45 days imprisonment with a $1,000 fine as to the misdemeanor marijuana conviction.

OPINIONS BELOW

The Opinion of the Arkansas Court of Appeals of September 23, 1998, is not published. A copy is attached as Appendix A. There is no trial court opinion in this matter.

JURISDICTION

This Petition seeks review of an Opinion entered by the Arkansas Court of Appeals of September 23, 1998. Petitioner seeks to invoke the jurisdiction of this Court to review this Opinion pursuant to 28 U.S.C. § 1257. Under Arkansas law, the Arkansas Court of Appeals is the state court of last resort in this matter.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

One issue in this application for writ of certiorari involves the Fourth Amendment, Appendix B, and both issues involve the Due Process Clause of the Fourteenth Amendment. See Appendix C.

STATEMENT OF THE CASE

A. *Procedural Posture*:

On August 8, 1996, an information was filed in Fulton County, Arkansas Circuit Court against John Michael Bates charging him with possession of a controlled substance with intent to deliver, methamphetamine, and possession of a controlled substance, marijuana, on or about August 4, 1996, as a result of a traffic stop in Fulton County, Arkansas.

Pretrial the defense moved to suppress the methamphetamine and the marijuana and all other derivative evidence on the grounds that the stopping of the U-Haul truck was illegal and without warrant or probable cause. The testimony pretrial and at trial showed that the U-Haul truck was in fact stopped based on suspicion and nothing more. There was no "reasonable suspicion" or probable cause and, therefore, the mere stopping of the U-Haul truck was illegal and the seizure of the methamphetamine and marijuana thereafter as alleged was a product of the unlawful stop and a violation of the Fourth Amendment and applicable provision of the Arkansas State Constitution. However, the defendant not only contended that the initial stopping of the U-Haul truck was illegal, but also the resultant pat-down search of Bates, detention, etc. This motion was denied after evidentiary hearing May 15, 1997, and at trial the jury, October 20, 1997, convicted him of possession of methamphetamine and sentenced him to a fine of $10,000 and also convicted him of possession of marijuana and sentenced him to 45 days in jail and a fine of $1,000. On November 12, 1997, judgment was entered by the Trial Judge and a notice of appeal was timely filed.

On appeal, September 23, 1998, the Arkansas Court of Appeals affirmed the convictions.

B. *Facts*:

On August 4, 1996,, at about 2 o'clock a.m., John Michael Bates was arrested after the U-Haul truck he was operating was stopped by law enforcement officers in Fulton County, Arkansas. The truck was stopped upon mere suspicion. Bates was searched and allegedly a very small amount of methamphetamine in two small vials inside a small zippered pouch was upon his person in the pocket of his shorts which was seized. A very small amount of marijuana was also allegedly seized. The proof at trial failed to establish that the methamphetamine alleged seized was the same as the methamphetamine as analyzed by a chemist in the Little Rock State Crime Lab. The chain of custody as to the marijuana was also not shown. The amount of alleged methamphetamine was not established as "usable," there was no evidence of the weight of the methamphetamine in the substance, assuming *arguendo* it was the same methamphetamine substance.

ARGUMENT

THE FOURTH AMENDMENT VIOLATION

Petitioner asserts that the Fourth Amendment was violated as applicable by way of the Fourteenth as a result of the traffic stop and subsequent searches.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In *Carroll v. United States*, 267 U.S. 132, 153 (1925), the Supreme Court established an "exigency" exception to the warrant requirement for moving vehicles based on their

inherent mobility. Under *Carroll*, a warrantless search of an automobile based upon probable cause to believe that the vehicle contained evidence of crime did not contravene the Warrant Clause of the Fourth Amendment. See *California v. Acevedo*, 500 U.S. 565 (1991) (reviewing history of the "automobile exception"). The seventy three years since *Carroll* have witnessed an expansion of police power to stop car drivers and search cars on less than probable cause. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court began to delineate and legitimate police-citizen stop-and-frisk encounters based on something less than probable cause, i.e., reasonable suspicion of crime (hereinafter "RS"). The *Terry* analysis has been adapted to the range of cases arising from police encounters with people in cars, and to the increasing volume of car traffic in drugs, guns, and money.

Traffic Stops Based on Reasonable Suspicion

Reasonable Suspicion Defined.

The police may stop a car and question the motorist based on reasonable suspicion that the person detained was, is, or will be engaged in criminal activity, or that evidence of a crime will be found. See *Berkemer v. McCarty*, 468 U.S. 420 (1984) (analogizing routine traffic stops to pedestrian stop-and-frisk activity pursuant to *Terry)*. Reasonable suspicion (RS) is not readily reduced to verbal formula; rather, it requires a case-by-case, and even, "frame-by-frame" analysis of the facts of each police-citizen encounter. The most common definitions of reasonable suspicion are negative: reasonable suspicion is something less than probable cause, which is itself defined as a "fair probability that evidence of a crime will be found." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Reasonable suspicion is

something less than proof of wrongdoing by a preponderance of the evidence. *INS v. Delgado*, 466 U.S. 210 (1984). However, reasonable suspicion is something more than a mere "hunch" or "unparticularized suspicion" of criminal activity. *Terry*, *supra*.

The governing rule is "reasonableness" to justify incremental police intrusions into private liberty. Accordingly, courts sustain evidence from car investigative detentions and seizures where the police officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion." Terry, 392 U.S. at 21. "Reasonableness" is determined from the totality of the circumstances, *Sokolow*, 490 U.S. at 8, and from the collective knowledge of the officers involved in the stop. See *United States v. Williams*, 876 F.2d 1521, 1524 (11th Cir. 1989).

Though reasonable suspicion (RS) is a highly pliable concept, the police do not yet have a free floating right, based on their "war on drugs" or their own safety, to stop and question or "frisk" vehicles or persons based on hunches or minimal suspicion of crime. The cases are litigated, where possible, at the threshold of seizure, i.e., to show that the police lacked the requisite level of articulable suspicion, and hence that the stop of a car (and subsequent seizure of evidence) was invalid at its outset.

THE UNLAWFUL STOP OF PETITIONER'S VEHICLE

A seizure occurs whenever a vehicle is stopped. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The Fourth Amendment applies. *Id.* A brief investigatory stop of a vehicle is also a seizure of the person of the occupants. *United States v. Cortez*, 449 U.S. 411, 417 (1981). See, also,

United States v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993); *United States v. Bloomfield*, 40 F.3d 910, 916 (8th Cir. 1994). There must be *reasonable suspicion* to justify an investigatory stop of a vehicle. *Delaware v. Prouse*, *supra*, at 661, 663.

The *Terry* rationale allows police to stop a moving vehicle based on a reasonable suspicion that its occupants are violating the law. *United States v. Diaz-Lizaraza*, 989 F.2d 1216, 1220 (11th Cir. 1993). There must be a "reasonable, articulable suspicion" that the person has been, is, or is about to be engaged in criminal activity. *United States v. Thomas*, 992 F.2d 201, 203 (8th Cir. 1993). See, also, *United States v. Braggs*, 23 F.3d 1047, 1049 (6th Cir. 1994); *United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994); *United States v. Halls*, 40 F.3d 275, 276 (8th Cir. 1994). There was no "reasonable suspicion" to stop Petitioner's vehicle and, therefore, the seizure was in violation of the Fourth Amendment applicable to the states via the Fourteenth Amendment Due Process Clause. The evidence (methamphetamine and marijuana) seized was obtained illegally and should have been suppressed and all fruits thereof.

THE ILLEGAL DETENTION OF THE OCCUPANTS OF THE DEFENDANT'S VEHICLE AFTER THE STOP

Additional questioning that goes beyond the original purpose of the stop must be supported by *additional* reasonable suspicion. *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994); *United States v. Bloomfield*, *supra*, at 918. See *United States v. White*, 42 F.3d 457, 460 (6th Cir. 1994) and *United States v. Ramos*, 20 F.3d 348, 352 (8th Cir. 1994).

There were no facts or circumstances to justify under the Fourth Amendment detaining the Petitioner Bates and the other occupants after the initial conversation and investigation.

THE ILLEGAL PAT DOWN-SEARCH OF THE PERSON OF EACH DEFENDANT

The stop and frisk exceptions are products of *Terry v. Ohio* (1968) *supra*, and *Sibron v. New York*, 392 U.S. 40 (1968). A stop is a seizure of the person. A frisk is a search of the person. Because both of these lesser intrusions infringe sufficiently on a citizen's right not to be stopped and not to be frisked, they fall within the coverage of the Fourth Amendment and must be reasonable to be permitted. Because, however, they are less intrusive than full-blown seizures and searches of the person, they may be deemed reasonable upon predicates less substantial than that of probable cause. The newly articulated (less substantial) predicate is now called "articulable suspicion": sometimes, good cause to believe; sometimes reasonable suspicion; and, sometimes, particularized suspicion.

Although the stop and the frisk require the same *quantitative* justification of articulable suspicion, they require different *qualitative* justifications. Because the governmental purpose of the stop is crime-related, the predicate for a stop must be articulable suspicion that (1) a crime has occurred; or (2) is then occurring; or (3) is about to occur. Because the governmental purpose of the frisk, however, is to protect the life and limb of the stopping officer, the predicate for the frisk is articulable suspicion that the person stopped may be armed.

The scope limitation on the stop is that it remain right at the spot or within very close proximity to where the stop

first occurred. The temporal scope limitation is that the stop only last a little while. The scope limitation on the frisk is that it be confined to the pat-down of the clothing surface of the person being frisked. That is all that is required to detect the presence of offensive weapons. That is all that is necessary, therefore, to serve the purpose of the frisk.

Minnesota v. Dickerson, 508 U.S. 366 (1993) recognized, by way of analogy to the Plain View Doctrine, the concept of a plain feel doctrine. [Its rationale seemingly would expand *Coolidge*'s second requirement to embrace all of the senses and not merely that of sight.]

Thus the police may take only reasonable actions to protect themselves assuming *arguendo* a lawful stop and detention. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977): officer may order driver to get out of vehicle without violation of the Fourth Amendment. They may check for weapons. *United States v. Thomas*, *supra*, at 203-204. They may order occupants out using drawn weapons when those actions are reasonably necessary. *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993). The test for the scope of the activity is whether the surrounding circumstances give rise to a justifiable fear for personal safety. *Id.* They may frisk for weapons depending on the circumstances. *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991). See, also, *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991).

Each case turns on its unique facts. *United States v. Watts*, 7 F.3d 122, 125 (8th Cir. 1993). Limited intrusion depending on the circumstances are reasonable. *Adams v. Williams*, 407 U.S. 143, 148 (1972); see, also, *New York v. Class*, 475 U.S. 106, 116 (1986). If an arrest procedure is

initiated prematurely, going beyond what was necessary to protect the officer's safety, the seizure is unreasonable and in violation of the Fourth Amendment. *United States v. King*, 990 F.2d 1552, 1563 (10th Cir. 1993). The interior compartments of the vehicle can be searched if the officers have a reasonable suspicion that it contains weapons dangerous to the officers. *Michigan v. Long*, 463 U.S. 1032, 1034-35 (1983) There must be specific and articulable facts in support of a reasonable belief that the suspect is dangerous. *United States v. Gleason*, 25 F.3d 605, 608 (8th Cir. 1994); *United States v. Watts*, 7 F.3d 122, 125 (8th Cir. 1993).

However, an overly intrusive stop may constitute an arrest requiring probable cause. See *United States v. Sharpe*, 470 U.S. 675, 686, 688 (1985).

SCOPE OF A TERRY FRISK

Any "frisk" was unlawful. Any alleged items seized should be suppressed.

The authority to frisk a suspect has been limited to the situations where "officers reasonably" believe that the suspect is armed. Self-defense is the rationale of the *Terry* stop and the most compelling justification. *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996). See, also, *United States v. Padro*, 52 F.3d 120 (6th Cir. 1995). The frisk must target weapons only. See *United States v. Ponce*, 8 F.3d 989, 999 (5th Cir. 1993) and *United States v. Gibson*, 19 F.3d 1449, 1451 (D.C. Cir. 1994). In *Minnesota v. Dickerson*, 508 U.S. 366 (1993):

> The purpose of this limited search is *not to discover evidence of crime*, but to allow the officer to pursue his investigation without fear of violence. ... (citations omitted). Rather, a protective search -- permitted

without a warrant and on the basis of reasonable suspicion less than probable cause -- must be *strictly limited to that which is necessary for the discover of weapons* which might be used to harm the officer or others nearby. (citations omitted). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. (citations omitted) (emphasis added).

In creating what has been termed the "plain-feel" doctrine, the Supreme Court held in *Dickerson* that an officer who conducts a pat-down search that stays within the parameters marked by *Terry* may seize non-threatening contraband as long as the identity of that contraband is immediately apparent to the officer without conducting some further search of the object. Drawing from the "plain-view" cases, the *Dickerson* court further defined the limits of its decision by reminding that police may seize contraband in plain view only when doing so does not intrude into anyone's privacy any more than the police are already authorized to do:

> If, however, the police lack probable cause to believe that an object in plain view is contraband without conducing *some further search of the object* ... the plain-view doctrine cannot justify its seizure.
>
> *Id.* 113 S.Ct. 2137 (emphasis added)

The *Dickerson* court suppressed the contraband seized from the defendant, holding that the police officer overstepped the bounds of a search for weapons allowed under *Terry* by squeezing and manipulating a lump in the suspect's pocket prior to determining that it was contraband. See, also, *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (applying

Dickerson, the court suppressed the money found in a brown paper bag seized from Schiavo holding that the officer's continued exploration of the bag went beyond that allowed in *Terry* because the incriminating nature of the bulge was not immediately apparent.)

One court applying *Dickerson* expressed its skepticism of police testimony on this point. In *United States v. Fernandez*, (S.D.N.Y Aug. 16, 1996), the district judge suppressed drug evidence seized during a *Terry* frisk. The officer testified that as he frisked the suspect and tapped on the suspect's pocket, he heard a "plasticky" crinkling sound. The officer questioned the suspect about it and, according to the officer, the suspect replied that it was "weed." Impressed by defense counsel's successful "impeachment by omission" and impeachment with a prior inconsistent statement in the officers' report, the district judge found the police officer's testimony "unconvincing"!! The district judge suppressed the drug evidence, concluding that the officer had no reasonable suspicion, much less probably cause, to believe that the object in the suspect's pocket was contraband.

When officers come upon an opaque container in the course of an investigatory stop, a warrant may be required before officers may invade the privacy of the package (e.g., Bates's small zippered pouch in his pocket). This principle

follows from *United States v. Jacobsen*,[1] 104 S.Ct. 1652 (1984), in which the Court wrote:

> Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.
>
> Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.
>
> *Id.* (emphasis added)

A recent decision by the court of criminal appeals in Alabama applied the analysis articulated by the Supreme Court in *Jacobsen*: *Seely v. State*, 669 So.2d 209 (Ala. Cr. App. 1995), With the factual situation being almost identical to that in *Jacobsen* -- the decisive exception that the Federal Express employees in *Seely* did not open the tube -- the *Seely* court held that the search by police officers was unreasonable and in violation of the Fourth Amendment. Focusing on an officer's (Ware) action in cutting open the package, the court explained:

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[1]. In *Jacobsen*, Federal Express employees opened a damaged package and found plastic bags of white powder inside. They notified the Drug Enforcement Administration. Responding to the call, a DEA agent field tested the powder which tested positive for cocaine and the defendant was subsequently arrested. *Id.*at 1655. Although the Supreme court held that the agent's search of the tubular package was reasonable because the agent's search did not go beyond that of the private search, the Supreme Court made it clear that warrantless searches of containers are presumptively unreasonable. *Id.* at 1657.

> Ware should have obtained a search warrant before cutting open the tubular package that contained cocaine. Ware had probable cause to obtain a search warrant based on his observations and on the results of the sniff test by the narcotics detection dog. Because Ware had dominion and control over the package, there was little change of loss or destruction of the package. There were *no exigent circumstances that justified opening the package before obtaining a search warrant*. *Id.* at 214 (emphasis added).

Thus, any "frisk" of the defendants where containers (i.e., the smalal zippered purse in the pocket containing allegedly the two small vials) were opened or any containers that were "opened" in the vehicle are suspect and unless justified by law, the fruits thereof, including the items themselves should have been suppressed as evidence.

Assuming that the stopping of the vehicle was lawful and assuming *arguendo* that the detention and pat-down was lawful, the officers did not have permission to open the container found in the pocket of the shorts of the defendant Bates upon pat-down after he was ordered from the vehicle. Perhaps ordering the driver, if stopped for a pretended traffic violation, was not an impermissible seizure. Perhaps a frisk upon observing an alleged bulge in the shorts was (also) justified. But there was no justification under the Constitution of the United States as well as the Constitution of the State of Arkansas to actually unzip the two inch by three inch pouch and search its contents. The officer could only search "reasonably" for a firearm: "pat down". [Elephants don't hide in closets and firearms are not contained in 2 x 3 inch zippered pouches!!]

The appellant below relied upon *Brunson v. State*, 925 S.W.2d 434 (Ark. 1996); however. as pointed out by the trial judge below, the Arkansas Supreme Court, March 17, 1997, reversed this Arkansas Court of Appeals decision. Also (below) His Honor cited *Wright v. State*, 300 Ark. 259 (1989) as authority for the denial of the motion to suppress. *Wright* had held that a limited search incident to a lawful stop must at times be performed expeditiously, holding that drugs found as a result of a frisk during an investigatory stop was admissible. Nevertheless, despite our contention the stop was not "lawful," nor the detention, nor the "pat-down," we submit that the recent decision *Stewart v. Arkansas*, CA CR 97-236, decided October 15, 1997, is directly in point and ample authority to hold the seizure unlawful under the Fourth Amendment. In reversing a Pulaski County Circuit Court, *Stewart* held that "...after this protective search, the officer went beyond mere protection" holding

> We see nothing in the record to suggest that the matchbox taken from appellant's pocket contained a weapon or posed a risk to the officer's safety. Even if this is a high-crime area, without some evidence other than suspicion or a hunch that a matchbox contains a controlled substance, it is patently inappropriate for an officer, under the guise of maintaining his or others' safety, to take a matchbox and open it. This was not a search incident to arrest. A protective search must be no more invasive than is necessary to ensure the officer's safety; looking inside the matchbox ensured no more safety to the officer.

As the United States Supreme Court in *Terry* stated:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Terry, 392 U.S. at 9, citing *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891). The Court went on to state:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

[citing *Terry*, 392 U.S. at 15]

For this, if no other reason, the search below fails and the *conviction* should be set aside. The officer had no authority to open the small zippered pouch in the front pocket of Bates's *shorts*. [He was wearing shorts.] Pat him down -- yes (maybe). But not to unzip the small pouch containing the small vials!! See, also, *United States v. Millan*, 912 F.2d 1014 (8th Cir. 1990). The conviction in *Millan* was reversed because evidence was obtained from an unlawful search of a jacket and a garment bag. The belief that jacket pockets contained narcotics was "too slender a reed" to justify even

the seizure of the person. *Id.* The initial seizure was held unlawful.

> Our society will survive if some criminals go free, but it will not survive if the very principles upon which our society is founded are undermined and broken. It is desirable that criminals be caught. It is necessary that a large percentage of them be caught. But it is far more important that in pursuing criminals the Constitution itself not be violated. Our society can tolerate only a very little of that. If the police officer in his zeal to catch the criminal violates the Constitution and thus himself ceases to be governed by laws and a Constitution, it becomes a society governed by the decisions of individual police officers in the pursuit of crime. In that kind of society the police constitute the power, and they are feared. It is not a free society.
>
> Sokol, *The Law-Abiding Policeman*,
>
> 9-10 (1969)

Judges are the keepers of the sacred flame, the enforcers of the values written into the Bill of Rights by its framers. The Fourth Amendment demands of law enforcement good things like warrants, probable cause, exigency, and police good faith. They all, however, are but the subcriteria by which we measure something else: reasonableness. For Fourth Amendment purposes, the police have to be reasonable when they search and when they seize because the Fourth Amendment demands it.

> THIS CASE ALSO PRESENTS AN IMPORTANT QUESTION OF LAW AS TO WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN

CONVICTIONS UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

The proof at trial failed because of insufficient evidence as to (a) the chain of custody to authenticate the alleged controlled substance methamphetamine and/or (b) that this substance was a useable amount. In essence, there was insufficient evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979) and therefore there was a violation of Fifth Amendment Due Process.

The chain-of-custody objection was a valid objection because the principal of fundamental fairness is necessarily defined and shaped by the rules of evidence. *United States v. Delano*, 825 F.Supp. 534, 545 (W.D.NY 1993) The United States Supreme Court has long held that "(e)stablished rules of ... evidence [are] designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also *United States v. Blumberg*, 961 F.2d 787, 789 (8th Cir. 1992). Accordingly, it is a "fundamental premise of any trial that the ultimate decision rests solely upon evidence presented by the parties *within the confines of the rules of evidence*." *Scott v. Ohio*, 480 U.S. 923, 925 (1987) (emphasis added).

A necessary part of laying a foundation, to meet the "chain of custody" requirement, means showing an unbroken chain of possession of the item prior to its introduction as an exhibit. If the arresting officer (for example) directs the defendant to give a blood sample pursuant to statute, the chain of custody is satisfied if the testifying arresting officer is shown the vial of blood, testifies that he saw it drawn at the hospital or station by the registered nurse, initialed and dated that sample, delivered it to the lab, received it and the results

back from the lab, and kept it in a *locked* evidence storage receptacle until trial. The vial(s) (and the test results) as evidence against John Michael Bates did not meet the chain of custody requirements.[2]

In *State v. Johnson*, 673 S.W.2d 877 (Tenn. Cr. App. 1984), the Tennessee Court of Criminal Appeals held that the purpose of a chain is to "prove the identity of a substance offered in evidence and its integrity, that is, that there was no substantial alteration in the article offered which would affect its validity as evidence."

A. *The standard of review as established by the Fifth Amendment Due Process Clause.*

In *Jackson v. Virginia*, *supra*, this Supreme Court said that to review on habeas corpus state convictions under the Fourteenth Amendment the standard was:

> No rational trier of fact could reasonably conclude guilt beyond a reasonable doubt.

Jackson v. Virginia, *supra* held:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.
>
> ...This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve

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[2]. There is one type of evidence where chain of custody is not required. These are objects which can be readily identified, even by a lay person. An example of this type of evidence is a blind person's cane found at the scene of an accident.

conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

In re Winship, 397 U.S. 358 (1970) had established that the Fourteenth Amendment Due Process Clause prohibits criminal conviction except upon proof beyond a reasonable doubt. The Opinion of the Arkansas Court of Appeals of September 23, 1998, Opinion, Appendix A, affirming the conviction, overlooked, or misapprehended the standard of review applicable to such conviction by virtue of the United States Supreme Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1997).

THE CHAIN OF CUSTODY ERROR

Over Bates's objection, the trial court introduced into evidence the alleged controlled substance, point four four eight nine (.4489) grams of methamphetamine, without requiring the State to properly authenticate the substance by proving the necessary links in the chain of custody. Bates did not waive the requirement of authenticity. Rule 901, Ark. R. Evid., requires:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Under the specific facts of this case, the chain of custody was insufficient because there was evidence the methamphetamine introduced at court was not the same alleged substance taken from Bates.

In Arkansas the courts have routinely stated that the proof of chain of custody for interchangeable items like drugs or blood, needs to be more conclusive. *Lee v. State*, 931

S.W.2d 433 (1996); *Gardner v. State*, 754 S.W.2d 518 (1988); and *Brewer v. State*, 551 S.W.2d 218 (1997). The purpose of establishing chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Lee v. State*, *supra*. Bates's counsel acknowledged that minor uncertainties in the proof in the chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence admissible as a matter of law. See *Gardner v. State*, *supra*. The missing link in the chain of custody was substantial.

Deputy Estes on August 4, 1996, at approximately 2:00 a.m. allegedly retrieved from Bates's front, left, shorts pocket a zippered pouch, which contained two brown vials. The two brown vials allegedly contained a small quantity of methamphetamine. Deputy Evans testified that he recovered the brown vials from Bates's pocket and that he put the evidence in the police locker. R.258 That evidence allegedly stayed in the evidence locker until it was transported to the State Crime Lab in Little Rock, but Estes did not have any knowledge as to how the evidence got to the State Crime Lab. R.260 Chemist Kathy Shanks testified only that an unidentified substance was received in the State Crime Lab in Little Rock which was allegedly hand-carried by Fulton County Sheriff Jack Collins, deceased, prior to trial. Chemist Shanks apparently received two separate samples of methamphetamine. One, which for an unknown reason was not available at trial, contained five point seven two one seven (5.7217) grams of a hard, off-white like substance. [This evidence "disappeared".] This substance allegedly contained sixteen point seven percent (16.7%) methamphetamine hydrochloride. R.169 Again, for an unknown reason, this

substance had "disappeared" and was not available during trial, and, therefore, was not permitted into evidence. The second alleged controlled substance, which was introduced into evidence, consisted of an off-white *powder* (as stated *supra*) weighing a total of point four four eight nine (.4489) grams which contained methamphetamine hydrochloride and the dimethyl sulfone. Chemist Shanks testified that the off-white powder was in one of the brown vials. Chemist shanks did not perform a *quantitative* analysis of the methamphetamine hydrochloride and dimethyl sulfone so she could not testify what percentage of the substance was methamphetamine. R.186

Chemist Shanks could not tell from personal knowledge how these substances were delivered to the Crime Lab nor how the substances were transported from the Crime Lab to the Fulton County Sheriff's Department. (The witness "guessed" the substance was shipped by UPS from the Crime Lab back to the Fulton County Sheriff's Department.) Deputy Estes did not attempt to testify that the substance in Court was the same substance he retrieved from Bates. Further, Deputy Estes could not explain the missing substance. Deputy Estes described the substance originally as granular, and not as a powder. R.272

As authority, Bates relied below upon two significant recent Arkansas Supreme Court cases, namely: *Crisco v. State*, 843 S.W.2d 582 (1997) and *White v. State*, 330 Ark. 813, ____ S.W.2d ___ (1997). The fact that the controlled substance "changed" from granular to powder is significant. More significant is the fact that five point seven two one seven (5.7217) grams of the controlled substance "disappeared" and was unaccounted for without any

explanation. Even more significant were the missing links in the chain of custody. Sheriff Jack Collins who allegedly hand delivered the substance from the Fulton County evidence locker to the State Crime Lab (no proof) was unavailable (deceased) and did not testify. The controlled substance "changed" from an off-white granular substance to an off-white powder. These factors together certainly create a significant possibility that the evidence tested was not the same as that allegedly taken by Fulton County officers from Michael Bates.

Bates testified and denied possessing any controlled substance. The facts were squarely on point with the facts in *Crisco v. State* and *White v. State*, *supra*. The alleged controlled substance simply should not have been admitted into evidence and, therefore, the proof fails. (The Opinion (Appendix A) reached erroneous conclusions and is in error.

Civil cases follow a different rule.[3]

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[3]. In *Government Suppliers Consolidating Services, Inc. v. Bayh, Governor of Indiana*, 753 F.Supp. 739 (S.D.In. 1990), trash brokers brought a suit challenging statutes regulating the importation and disposal of trash in Indiana. The plaintiff in that cause presented evidence of medical waste found at what was an otherwise sanitary land field. An objection was raised as to the "insufficient chain of custody" and the Court overruled the objections stating that "[w]hile it is clear that the defendant did not present a complete chain of custody , the case establishes that any breaks on the chain of custody impact the weight of the evidence and not its admissibility, as long as the Court makes threshold determination that such evidence has not been changed in any important respect." 753 F.Supp. at 772, n.40, citing *Hoover v. Thompson*, 787 F.2d 449, 450-51 (8th Cir. 1986); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154-55 (5th Cir. 1981); Note, Admission of Demonstrative Evidence, 61 Northwest U. Law Rev.

THE FULTON COUNTY, ARKANSAS, TRIAL COURT ALSO ERRED BY NOT REQUIRING THE STATE TO PROVE THE ALLEGED CONTROLLED SUBSTANCE CONTAINED A USABLE AMOUNT OF METHAMPHETAMINE

Bates at the conclusion of the State's evidence and at the conclusion of all the evidence properly moved (insufficient evidence) to dismiss the charges also because the State of Arkansas did not prove Bates possessed a usable amount of methamphetamine. Specifically, the only substance introduced at the trial was point four four eight nine (.4489) grams of an off-white powder substance that allegedly contained methamphetamine hydrochloride and dimethyl sulfone. R.179 Chemist Shanks, as stated *supra*, did not perform a *quantitative* analysis to determine which portion of the powder substance was methamphetamine hydrochloride or dimethyl sulfone. R.186 Chemist Shanks testified she was

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472, 477-79 (1966) (discussing the relaxed chain of custody requirement in state court civil cases). The court's opinion in *Government Suppliers* goes on to note that a "trial court is also entitled to assume that public officials who had custody of evidence did not tamper with the evidence." 753 F.Supp. at 772, citing *Williams v. Butler*, 746 F.2d 431, 442 (8th Cir. 1984). Finally, the court concluded that there was "no hint that the [government] defendant and his agency did anything to compromise the authenticity of the proffered evidence." 753 F.Supp. at 772. See also, *United States v. Henderson*, 588 F.2d 157, 160 (5th Cir. 1979), *cert. denied*, 440 U.S. 975 (1979) (it is "firmly established" that the question of whether the proponent of evidence has proved inadequate chain of custody goes to the weight rather than the admissibility of evidence, and is thus reserved for the trier of fact); *United States v. Lane*, 591 F.2d 961 (D.C. Cir. 1979).

not aware of any *taste* test for methamphetamine. She testified she could not *see* methamphetamine hydrochloride without some type of laboratory test. She further testified she could not testify what it would take to be classified as a usable amount of methamphetamine.

The Arkansas Supreme Court held in *Harbison v. State*, 790 S.W.2d 146 (1990), that in simple possession of controlled substance cases it is not illegal to possess less than a usable amount of a controlled substance primarily because legislators did not intend to criminalize less than a usable amount. The Opinion, Appendix A, reached another erroneous conclusion as to *Harbison*. Less than a usable amount cannot contribute to future conduct at which the legislation is aimed and which is use of trafficking in drugs. It is also a matter of constitutional Due Process. Bates was convicted of possessing *methamphetamine*. The drugs were allegedly found in a zippered pouch in his front pocket.

The State failed to offer any evidence whatsoever to prove beyond a reasonable doubt that the portion of the white powdery substance identified as methamphetamine was (1) sufficient to permit knowledge of its presence without the need for scientific identification, or (2) sufficient to be usable in the manner in which such a substance is ordinarily used. Therefore, the conviction of possessing methamphetamine should also be set aside under *Jackson v. Virginia*, *supra*, because of this insufficient evidence.

The United States Supreme Court in *In re Winship*, *supra*, held that the United States Constitution prohibits criminal conviction except upon proof beyond a reasonable doubt. [The constitutional standard in federal and state cases is obviously the same.]

The standard of review for sufficiency of the evidence is that the court must view the evidence as to whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See, again, for example, *United States v. Warren*, 18 F.3d 602 (8th Cir. 1994), where the Eighth Circuit (for example) holds that the court must affirm a conviction unless it concludes "that a reasonable fact finder could not have found guilt beyond a reasonable doubt." See, also, *United States v. Ortiz*, 23 F.3d 21 (1st Cir. 1994); *United States v. D'Amato*, 39 F.3d 1249 (2d Cir. 1994); *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *Bergman v. McCaughtry*, 65 F.3d 1371 (7th Cir. 1995); and *United States v. Edmonds*, 103 F.3d 822, 824-25 (9th Cir. 1996).

We do not object to the review of the evidence and the inferences that may reasonably be drawn "in the light most favorable to the verdict." But we do object to a conviction where there is (1) a substantial break in the chain of custody, even if the substance is held admissible, and (2) it is not a "usable" amount.

C. *Brief Historical Review of Background and Roots of Modern Standard of Review*

> ....This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflict in the testimony, to weigh the evidence, and to draw reasonable inferences from basis facts to ultimate facts.
>
> *Jackson v. Virginia*,
> 443 U.S. 307 (1979)

The idea of protecting the accused can be traced back at least two thousand years having been recognized long before it was enshrined in English common law. The Roman Emperor Trajan (52-117) pronounced "it was better to let the

crime of a guilty person go unpunished than to condemn the innocent" according to the Digest of Justinian. *Coffin v. United States*, 156 U.S. 432, 454 (1895); Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, The Lawyers Co-operative Pub. Co. 692 (1938) It was a maxim of Roman law that where there was a conflict in evidence the most favorable construction to the accused should be adopted.[4] "In all cases of doubt, the most merciful construction of facts should be preferred," *Coffin*, *id.*; Burdick, 692-693.

In mid-15th century England, Chief Justice Fortescue expressed the great principle: "Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally. *Coffin*, 156 U.S. at 455.

A century and a half later even the notorious Star Chamber professed to honor the principle that "it were better to acquit twenty that are guilty than condemn one Innocent." Levy, *Origins of the Fifth Amendment* 33 (1968) The relative humanity of the English judges was in marked contrast to the inquisitorial system in use on the continent. It was said, for example, of an inquisitor of the French royal court that he

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[4]. The Romans may have had a standard of proof in criminal cases even higher than beyond reasonable doubt. It was said that:

> All accusers should know that no criminal charge should be brought unless it can be supported by competent witnesses, or established by the most convincing documents, or shown by circumstantial evidence *clearer than daylight* resulting in undoubted proof.

conducted himself as if "sacrifice of a hundred innocent men were better than the escape of one guilty." Id. at 32. In fairness to the French, however, Voltaire iterated the great principle two decades prior to the publication of Blackstone's Commentaries.[5] See *Zadig*, ch. 6 (1747), "It is better to risk saving a guilty person than to condemn an innocent one," quoted in *Bartlett's Familiar Quotations* (14th ed. 1968), p.417a.

The principle that it is better that ten guilty escape than one innocent suffer became embedded into the English law as bedrock and was carried to the American colonies where it was received in a climate of liberty.

The presumption of innocence is not expressly set forth in the Constitution, but by the middle of the nineteenth century it was well established in the states that it was mandatory to instruct jurors on the presumption or it was reversible error. *McCormick*, Evidence 962-968 (3d ed. 1984); see also *Coffin*, 156 U.S. at 457-458. It was a universal practice.

In *Coffin* the Court embarked on a scholarly exegesis of the historical origins of the presumption and concluded unanimously that the presumption was basic to a fair trial and

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[5]. Blackstone, *Commentaries on the Laws of England*, 352 (1769 ed.), republished The Legal Classics Library (1983). *Coffin*, 156 U.S. at 456. *Coffin* also quoted Lord Hale (1678) that "it is better five guilty persons should escape unpunished than one innocent person should die." "It is better that ten guilty persons escape, than that one innocent suffer." Sir William Blackstone (1723-80), *Commentaries on the Laws of England*, 15th edn, 1809, vol. 4, p.358. "It is better to risk saving a guilty person than to condemn an innocent one." Voltaire (1694-1778), *Zadig*, 1747

reversal for failure to instruct. 156 U.S. at 453-461 *Coffin* also engages in an enlightening explanation of the distinction between the presumption of innocence and reasonable doubt: "one is a cause, the other an effect." 156 U.S. at 460 The presumption of innocence is in the nature of evidence in favor of the accused. 156 U.S. at 459-460. *Taylor v. Kentucky*, 936 U.S. 478 (1978) held that the presumption of innocence was guaranteed as an instruction by due process. See, also, *United States v. Romano*, 382 U.S. 136 (1965); *Tot v. United States*, 319 U.S. 463 (1943); and *McFarland v. American Sugar Rfg. Co.*, 241 U.S. 79 (1916). See *Leland v. Oregon*, 343 U.S. 790, 799 (1952).

The Due Process Clause precludes states from discarding the presumption of innocence. *McMillan v. Pennsylvania*, 106 S.Ct. 2411, 2417 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977)

REASONABLE DOUBT

The concept of proof beyond a reasonable doubt was established at common law before the adoption of the Sixth Amendment. As with the presumption of innocence, the states took the lead in requiring proof beyond a reasonable doubt. See *In Re Winship*, 397 U.S. 358, 372 (1970) (Justice Harlan) McCormick, *Evidence* 962-963 (3d ed 1984).

> The Constitution does not mention... the presumption of innocence nor does it say that guilt must be proven beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue.

Johnson v. Louisiana, 406 U.S. at 381 (Douglas, J., dissenting)

Mr. Justice Douglas refers, of course, to *In re Winship*, 397 U.S. 358 (1970).

Justice Brennan began his analysis in *Winship* by expressing the Court's concern for the inevitability of error in decision-making. He quoted from his earlier opinion for the Court in *Speiser v. Randall*, 357 U.S. 513, 525 (1958). "There is always in litigation a margin of error, representing error in fact-finding...." The reasonable doubt standard (he said) "is a prime instrument for reducing the risks of convictions resting on factual error." 397 U.S. at 363. Justice Brennan then expressed the importance of certainty in decision-making to three groups: (1) the triers of fact, (2) society as a whole and (3) criminal defendants, and concluded as to each that the reasonable doubt standard was indispensable. As to the trier of fact, "the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" 397 U.S. at 364. As to the general citizenry, "use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 364. As to those suspected and accused, "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal

offense without convincing a proper fact-finder of his guilt with utmost certainty." *Id.*

As a result of *Winship*, the burden of proof always rests upon the prosecution. It never shifts. *Mullaney v. Wilbur*, 421 U.S. 684 (1975) See, also, *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Yates v. Evatt*, 500 U.S. 391 (1991). Moreover, as a result of *Winship* and *Jackson v. Virginia*, 443 U.S. 307, 321, n.14 (1979), there has been a revolution in the appellate courts in evaluating the sufficiency of evidence to sustain convictions. 443 U.S. at 307. Although nominally setting a review standard for federal *habeas corpus* review, the standard established in *Jackson* has been generally applied to all sufficiency of evidence claims on appeal. The standard flows directly from *Winship* and in fact was seen by the *Jackson* Court to be a necessary complement to *Winship*. 443 U.S. at 313-318 The standard for appellate review of insufficiency of evidence claims set forth in *Jackson* is: a criminal conviction cannot be sustained if, on review of the trial record in the light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt. 443 U.S. at 324.

In conclusion, due process of law today as yesterday requires that in a criminal proceeding the state prove "beyond a reasonable doubt... every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358 (1970); see also, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). A conviction founded on less than sufficient proof of every element of the charged offense violates the accused's right to due process of law and thus cannot stand. *Jackson v. Virginia*, 443 U.S. 307 (1979). In reviewing the

sufficiency of the evidence, the appellate court must take the evidence in the light most favorable to the State and grant the State all reasonable inferences from the evidence. The state must nonetheless prove all requisite facts. Inferences are permitted, but presuming the existence of an element of a crime is not permitted; guilt must be proved. *Francis v. Franklin*, 471 U.S. 307 (1985)

Due process requires that a criminal defendant convicted on less than sufficient evidence be discharged. *Osborne v. Ohio*, 495 U.S. 103 (1990). This case must be reversed and John Michael Bates discharged.

CONCLUSION

For the foregoing reasons, Petitioner John Michael Bates requests that this Court grant certiorari.

Respectfully submitted,

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APPENDIX A

ARKANSAS COURT OF APPEALS

ARKANSAS COURT OF APPEALS

CACR 98-166

September 23, 1998

	Opinion Delivered
JOHN MICHAEL BATES APPELLANT	APPEAL FROM FULTON COUNTY CIRCUIT COURT
VS.	
STATE OF ARKANSAS APPELLEE	HONORABLE JOHN DAN KEMP, CIRCUIT JUDGE AFFIRMED

JOHN E. JENNINGS, Judge

John Michael Bates was found guilty by a Fulton County jury of possession of methamphetamine and was sentenced to five years' probation. He argues four points on appeal: (1) that the trial court erred in refusing to grant his motion to suppress evidence seized in violation of his Fourth Amendment rights; (2) that the trial court erred by allowing introduction of evidence when the State failed to establish its authenticity by showing a proper chain of custody; (3) that the trial court erred by not requiring the State to prove that the methamphetamine was a "usable amount; and (4) the trial court erred in sentencing appellant to probation rather than a fine. We disagree and affirm.

Appellant's first argument is that the trial court erred in denying his motion to suppress. In reviewing the trial court's denial of a motion to suppress, we make an independent determination based on the totality of the

circumstances, and reverse only if the trial court's ruling was clearly against a preponderance of the evidence. Welch v. State, 330 Ark. 158, 955 S.W. 2d 181 (1997).

The Fulton County Sheriff's Department had information from various sources indicating that the appellant was involved in drug trafficking. When officers learned that the appellant and his wife had rented a house in Vida, they set up "loose surveillance" of the house. Around 2:00 a.m. on August 4, 1996, a deputy noticed a large U-Haul truck backed up to the house. He notified other officers, who became suspicious of possible drug-related activity. Believing the truck might contain meth-amphetamine, the officers resolved to stop the truck when it pulled away from the house and they noticed that one of the headlights was burned out.

Officers stopped the truck three quarters of a mile from the house. The driver, appellant, stepped out. Remaining in the cab were appellant's wife and an individual, Delanie Berg, who officers knew had previous arrests on methamphetamine and firearms charges. The appellant was taken to the rear of the truck where he was frisked. Officers removed the two other passenger from the cab and found a semi-automatic pistol beneath the passenger seat.

As appellant was escorted to the rear of the truck, officers noticed "bulges" in his pockets. Appellant was told to place his hands on the patrol car. Deputy Estes "patted down" appellant, removing the contents of appellant's pockets and placing the items found on the hood of the patrol car. These included a small gray zippered pouch or bag. The appellant was handcuffed, and the deputy opened the small bag. The appellant was then arrested for

possession of a controlled substance.

The appellant argues that the stopping of the truck was unlawful, that the "detention" and pat-down search of the appellant were unlawful, and that the officers had no justification for opening the zippered pouch found in his pocket. We disagree.

It is well-settled that a police officer may stop and detain a motorist where the officer has probable cause to believe that a traffic violation has occurred. Travis v. State, 331 Ark. 7, 959 S.W.2d 32 (1998). Here, the officers observed appellant driving a truck with a burned-out headlight. If a reasonable officer would have made such a traffic stop, the officers' ulterior motives do not render the stop invalid. See, e.g., Mings v. State, 318 Ark. 201, 884 S.W.2d 596 (1994); Brown v. State, 54 Ark. App. 44, 924 S.W. 2d 251 (1996); Miller v. State, 44 Ark. App. 112, 868 S.W. 2d 510 (1993), cert. denied, 114 S. Ct. 2137 (1994). An officer making a traffic stop may order the occupants out of the vehicle. Wright v. State, 327 Ark. 558, 940 S.W.2d 432 (1997). If facts available to the officer would warrant a person of reasonable caution to believe that a limited search for weapons was appropriate, the officer may search an individual's outer clothing and immediate vicinity. Shaver v. State, 332 Ark. 13, 963 S.W.2d 598 (1998). However, if the officer has probable cause to arrest, he may conduct a search incident to that arrest before the arrest is actually made, provided the search and arrest are substantially contemporaneous. Brunson v. State, 327 Ark. 567, 940 S.W2d 440 (1997). A search of similar scope, including the person and areas within his immediate control, as that incident to an arrest, may be made even if the officer's decision is to issue a citation in lieu of an arrest, as

a citation is equivalent to a custodial arrest for authority to search purposes under Arkansas Rule of Criminal Procedure 5.5. State v. Earl, 333 Ark. 489, ____ S.W.2d ____(1998); Kimery v. State, ____ Ark. App. ____, ____ S.W.2d ____ (Sept. 9, 1998). In light of this authority, the stop and search were valid and the trial court did not err in denying appellant's motion to suppress.

The appellant next argues that the trial court erred by allowing into evidence the methamphetamine found in his pocket because the State had not shown a sufficient chain of custody. At trial, Deputy Estes testified that he took the evidence recovered from appellant to the police locker. He wrote a receipt for the items taken from appellant. His written description described the two brown vials as containing a "granular" substance. He testified that it is "routine procedure" for the person who takes evidence from the locker to transport it to the state crime lab. He identified the items placed in evidence as those removed from appellant's pocket. Kathy Shanks, a forensic chemist with the state crime laboratory, testified regarding standard operating procedure for the lab's receipt of evidence and the preparation of a submission sheet. The submission sheet indicated that the evidence had been hand carried to the lab by Sheriff Jack Collins. Included in that evidence were the two brown vials containing an "off-white powder" which tested positive for methamphetamine. She testified that her heat seal of the evidence bag was intact in court when she opened the bag, and that the items in the bag, including the brown vials, bore her initials, the case number, and the date upon which she opened the case.

The appellant argues that the State's chain of custody is insufficient because Sheriff Collins, being

deceased, was unavailable to testify regarding his delivery of the evidence to the lab. Appellant also argues that the discrepancies between the deputy's description of a "granular" substance and the chemist's description of a "powder" raise a "significant possibility" that the evidence tested was not the same as that taken from appellant. We disagree.

> As the supreme court has recently reiterated:
> The purpose of establishing chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. Newman v. State, 327 Ark. 339, 939 S.W.2d 811 (1997); Lee v. State, 326 Ark. 229, 931 S.W.2d 433 (1996); Harris v. State, 322 Ark. 167, 907 S.W.2d 729 (1995). See also Ark. R. Evid. 901. The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with, but it is not necessary for the State to eliminate every possibility of tampering. Newman v. State, supra; Lee v. State, supra; Harris v. State, supra; Gardner v. State, 296 Ark. 41, 754 S.W.2d 518 (1988). Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissable as a matter of law. Gardner v. State, supra; Nash v. State, 267 Ark. 870, 591 S.W.2d 670 (Ark. App. 1979). We have stated that the proof of the chain of custody for interchangeable items like drugs or blood

needs to be more conclusive. Lee v. State, supra; Gardner v. State, supra; Brewer v. State, 261 Ark. 732, 551 S.W.2d 218 (1977).

Crisco v. State, 328 Ark. 388, 943 S.W.2d 58.2 (1997). We cannot say that the trial court abused its discretion in admitting this evidence. The appellant argues that the trial court erred by not requiring the State to prove that he possessed a "usable amount" of methamphetamine. The two vials contained 0.4489 grams of methamphetamine hydrochloride mixed with dimethyl sulfone, a cutting agent. Appellant argues that, because the chemist could not testify what percentage of the mixture in the vials was methamphetamine, the State failed to show that he possessed a "usable amount" pursuant to Harbison v. State, 302 Ark. 315, 790 S.W.2d 146 (1990). We disagree.

Harbison dealt with a "trace amount" of cocaine residue too small to weigh with state crime laboratory equipment. The case at bar is more like that of Sinks v. State, 44 Ark. App. 1, 864 S.W.2d 879 (1993), where we held that an amount of controlled substance that was capable of quantative analysis, could be seen with the naked eye, was tangible and could be picked up, was clearly a measurable amount that satisfied the requirements of Harbison. Here, appellant possessed more than twice the amount of methamphetamine by aggregate weight, including adulterants or diluents, necessary to raise the presumption that one possesses a stimulant drug with intent to deliver. See Ark. Code Ann. § 5-64-40 (a) (1) (i) and (d) (Repl. 1997). The supreme court has stated that a vial containing 100 milligrams of methamphetamine seized from an appellant's person would support a conviction for

possession of a controlled substance even in light of a Harbison challenge. See Moore v. State, 304 Ark. 257, 801 S.W.2d 638 (1990). Here, the methamphetamine was found along with drug paraphernalia with which it could have been ingested. There was substantial evidence from which the jury could find that appellant possessed a usable amount of methamphetamine.

Appellant's final argument concerns sentencing. The jury was instructed to complete three separate verdict forms. The first form, concerning possession of methamphetamine, allowed the jury to impose a term of three to ten years in the Arkansas Department of Correction, or a fine not exceeding $10,000.00, or both a term of imprisonment and a fine. The jury completed that form indicating a fine of $10,000.00 with no term of imprisonment. A second verdict form, concerning possession of marijuana, is not at issue on appeal. The third verdict form, drafted pursuant to AMCI 2d 9111, permitted the jury to make a recommendation as to an alternative sentence as allowed by Ark. Code Ann. § 16-97-101(4) (Supp. 1997). The jury completed that form, recommending a five-year period of probation. At a subsequent sentencing hearing, the trial judge placed appellant on five years' probation.

Appellant argues that, because the jury's recommendation of probation is not binding on the court, appellant can, at his own election, reject the option of probation if the trial court's terms and conditions of probation are not to his liking. He argues that the court cannot impose terms and conditions of probation "too onerous" or appellant "can simply reject same." He argues that, prior to sentencing, he elected not to be placed on

probation but instead to be subjected to the jury's fine, and that the court abused its discretion and exceeded its authority by imposing probation. We disagree.

The bifurcated sentencing statute, Ark. Code Ann. § 16-97-101, provides that the trial court may, in its discretion, instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify and that the jury may, in its discretion, make a recommendation regarding an alternative sentence which shall not be binding on the trial court. Appellant requested such an instruction, and it was given. Arkansas Code Annotated section 16-93-1206(b) (1) (Supp. 1997) provides that one such alternative is probation pursuant to Ark. Code Ann. §§ 5-4-104 - 5-4-311. While it is clear that the jury may recommend probation, the actual assessment of probation lies within the sound discretion of the trial court. Higgins v. State, 326 Ark. 1030, 936 S.W.2d 740 (1996). Appellant has cited no authority, and we are aware of none, that fetters the trial court's discretion by allowing a defendant to dictate the terms and conditions under which he will acquiesce to the court's imposition of a statutorily authorized alternative sentence. Although appellant asserts that the conditions of his probation are "numerous and onerous," he raised no more specific issues concerning the conditions contained in the order of probation either before the trial court or on appeal. See Higgins v. State, 326 Ark. 1030, 936 S.W.2d 740 (1996) (issues concerning conditions of probation not raised before the trial court will not be considered for the first time on appeal). We find no abuse of discretion in the trial court's imposition of probation.

Affirmed.

PITTMAN and AREY, JJ., agree.

APPENDIX B

UNITED STATES CONSTITUTION
AMENDMENT IV

AMENDMENT IV
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX C

UNITED STATES CONSTITUTION
AMENDMENT XIV, CLAUSE I

AMENDMENT XIV, CL. I
CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAR 11 1999
CLERK

NO. 98-1066

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHN MICHAEL BATES, *Petitioner*

v.

STATE OF ARKANSAS, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WAS EVIDENCE SEIZED AS A RESULT OF A WARRANTLESS TRAFFIC STOP INTRODUCED IN VIOLATION OF THE FOURTH AMENDMENT?

II.

WAS THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE VIOLATED IN THAT NO RATIONAL TRIER OF FACT COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT?

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OPINION BELOW

The State of Arkansas, Respondent, respectfully requests that the Court deny the petition for writ of certiorari seeking review of the Arkansas Court of Appeal's unreported opinion in this case, which appears at Pet. at A-1 to A-8.

JURISDICTION

Respondent acknowledges the Court has discretionary jurisdiction to review the first question presented (raising a Fourth Amendment claim) in this case pursuant to 28 U.S.C. §1257(a). That statute, however, does not vest the Court with jurisdiction to entertain the second question presented (purporting to raise a Due Process claim) because the Arkansas Court of Appeals did not decide a federal question.

STATEMENT OF THE CASE

Respondent relies on the description of the facts contained in the opinion below and incorporates that description by reference, Pet. at A-1 to A-8, with the following two additional statements about the case. First, the Petitioner wrongly maintains that the circumstances of the vehicle stop which led to his arrest were "based on suspicion and nothing more[]" and "upon mere suspicion." Pet. at 1, 2. The trial court concluded that the officers could stop the vehicle on reasonable suspicion of drug trafficking and to investigate a possible burglary. Op. Br. at A-1. Moreover, as the Arkansas Court of Appeals noted below, Pet. at A-2, the Fulton County, Arkansas, Sheriff's Department had information that the Petitioner was involved in drug trafficking and conducted some surveillance of his residence. On the day of his arrest, an officer noticed a U-Haul truck backed up to the residence in the early morning hours, and, when the truck pulled away from the

residence, officers noted that one of its headlights was burned out. *Id.* Petitioner was driving the vehicle when it was stopped a short time later. *Id.* The Respondent argued below, and the court of appeals concluded, that the stop was justified because driving without a headlight is a misdemeanor in Arkansas. Op. Br. at C-2; Pet. at A-3 to A-4.

Second, the Respondent did not rely upon Arkansas Rule of Criminal Procedure 5.5 (search incident to citation) to support the search of the Petitioner. More importantly, the Petitioner did not challenge the constitutionality of that rule, even assuming it was support for the search. Op. Br. at B-1 to B-15, C-1 to C-2. Briefing of the Petitioner's case before the Arkansas Court of Appeals' was concluded in May 1998 before Respondent first succeeded in defending a search on Rule 5.5 grounds in *State v. Earl*, 970 S.W.2d 789 (Ark.), *cert. denied*, 119 S. Ct. 423 (1998) (search valid incident to citation under Ark. R. Crim. P. 5.5). The Arkansas Court of Appeals handed down its decision in this case after *Earl*, but before this Court's decision in *Knowles v. Iowa*, 119 S. Ct. 484 (1998). Although the court of appeals relied, in part, upon Rule 5.5 and *Earl* to uphold the search in this case, *see* Pet. at A-3 to A-4, that court did not decide whether that rule runs afoul of the Fourth Amendment.

REASONS FOR DENYING THE WRIT

I. The First Question Presented By The Petition Does Not Raise An Important Constitutional Issue.

The first question, "[w]as evidence seized as a result of a warrantless traffic stop introduced in violation of the Fourth Amendment[,]" Pet. at i, and the facts of this case do not present the Court with an important constitutional issue which has not been already resolved. The propriety of the traffic stop certainly

raises no significant issue. The trial court found as a matter of fact that the police had probable cause, supported by specific information, to stop the truck the Petitioner was driving. Op. Br. at A-1. The Arkansas Court of Appeals affirmed the validity of the stop, noting as well that the officers had noticed the truck had a burned-out headlight, a misdemeanor under Arkansas law. Pet. at A-3; Op. Br. at C-2. As this Court recently made clear, an objectively reasonably basis for a traffic stop is sufficient to sustain its validity, regardless of other motivations of the officers making the stop. *See Whren v. United States*, 517 U.S. 806, 810, 813-16 (1996).

Nor does this case raise the issue recently addressed in *Knowles v. Iowa*, 119 S. Ct. 484 (1998) – whether the Fourth Amendment invalidates a state law that permits a search incident to a traffic citation. While the Arkansas Court of Appeals apparently relied in part upon the Arkansas criminal procedure rule and case law that permits searches incident to citation, Pet. at A-4 (citing Ark. R. Crim. P. 5.5 and *State v. Earl*, 970 S.W.2d 789 (Ark.), *cert. denied*, 119 S. Ct. 423 (1998), it also cited and relied upon other principles of Fourth Amendment law, including the authority of police to conduct pat-down searches of those detained for traffic offenses. Despite the breadth of the court of appeals citation to authority, on review it is clear that the issue before the Court in *Knowles* is not presented in this case, either factually or legally.

Factually, this case involves nothing more than the validity of a *Terry* frisk during a traffic stop. The Petitioner's U-Haul truck was pulled over by police officers, who ordered him out of the vehicle, whereupon they noted his pockets were bulging. When asked if he was carrying weapons, he said he was carrying a knife. An officer performed a pat-down frisk, ultimately uncovering a pouch containing controlled substances. Thus, unlike the unfounded vehicle search conducted under state law

in *Knowles*, the search of the Petitioner was predicated on concerns for officer safety, consistently with well-established authority from this Court. The only Fourth Amendment issues presented by this case are whether the officers had reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, to frisk the Petitioner, and, perhaps, whether the scope of that frisk was within the parameters outlined by *Minnesota v. Dickerson*, 508 U.S. 366 (1993), and like cases.

Legally, this case presents no occasion for the Court to consider whether Ark. R. Crim. P. 5.5 remains good law in the wake of *Knowles*. Indeed, the inapplicability of *Knowles* to his case is apparently recognized by the Petitioner, who does not challenge the constitutionality of Rule 5.5 in this Court, and which he never raised in the Arkansas Court of Appeals.[1] That court likewise did not decide (or even discuss) the constitutionality of Rule 5.5, despite citing it. Finally, the Respondent has never raised Rule 5.5 in support of the search in this case. Stated differently, although the case presents a Fourth Amendment question, it does not fairly present a challenge to Rule 5.5 on Fourth Amendment grounds because no such challenge was made or decided below. *See Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477 (1945). Any remaining challenge involves only the application of settled law to the facts of this case. The Court should deny the writ as to the first question presented.

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[1]The Petitioner's reasons for granting the writ as to the first question are in large measure nearly a verbatim restatement of his brief before the Arkansas Court of Appeals. *Compare*, Pet. at 2-15, *with* Op. Br. at B-1 to B-15.

II. The Arkansas Court of Appeals Did Not Decide The Second Question Presented, And That Court's Decision Rests On Fact-Bound Determinations.

The Arkansas Court of Appeals did not decide the second question presented – "[w]as the Fourteenth Amendment Due Process Clause violated in that no rational trier of fact could have found guilt beyond a reasonable doubt." Pet. at i. The Petitioner bases this Due Process claim on his second and third arguments raised and decided below. As is plain from even a cursory examination of those arguments, however, the Petitioner raised, and the Arkansas Court of Appeals decided, only questions about the admissibility of the controlled substance seized from him on chain-of-custody and usable-amount grounds. Op. Br. B-16 to B-20; Pet. at A-4 to A-7. The petitioner's lengthy Due Process claim advanced here, Pet. at 15-30, was neither made nor decided below. Consequently, the writ should be denied on this purportedly presented question. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam).

Moreover, the Arkansas Court of Appeals' decisions on both points rest on fact-bound reviews of the evidence that do not purport to interpret principles of Due Process concerning the sufficiency of the evidence to support a conviction. Pet. at A-4 to A-7. These factual determinations do not warrant plenary review of the Petitioner's conviction on Due Process grounds. The Court should deny the writ as to the second question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Order denying defendant's motion to suppress filed in Fulton County Circuit Court on May 15, 1997.

IN THE CIRCUIT COURT OF FULTON COUNTY,
ARKANSAS

STATE OF ARKANSAS PLAINTIFF
VS. No. CR-96-31
JOHN MICHAEL BATESDEFENDANT

ORDER DENYING DEFENDANTS MOTION TO SUPPRESS

On January 23, 1997, comes on for hearing the Defendants Motion to Suppress Evidence and from the evidence presented at the hearing held on January 23, 1997, the briefs of the parties and applicable law, the Court finds:

1. The Court has considered the totality of the circumstances of this matter. From all of the information available to the Fulton County Sheriff's Department, the officers had probable cause to stop this U-Haul truck at approximately 2:00 a.m. on August 4, 1996, to investigate for drugs and to investigate for a possible burglary. The officers had probable cause to stop based on the intelligence they had from the State police, the chemical spills of the defendant's prior residence, their surveillance of the defendant's premises and the uncommon comings and goings from the residence, the prior use of defendant's vehicle in drug related offenses, the movement of the U-Haul in such early morning hours, and their law enforcement experience and training in regard to the way drugs are transported.

2. The Defendant relied strongly in the argument presented in his brief on the case of Brunson v. State, 54 Ark. App. 248, 925 S.W.2d 434 (1996). Following the Suppression hearing in the Bates case herein, the Arkansas Supreme Court reviewed the Brunson case and affirmed the trial court ruling, which reversed the Court of Appeals decision. See Brunson v.

State, ___ Ark. ___ (opinion delivered March 17, 1997).

3. Based on the Brunson case decided by the Arkansas Supreme Court, the Fulton County officers had probable cause to stop the U-Haul vehicle in which Mr. Bates was the driver. For officer safety, the officers had the right to conduct a pat down for weapons, upon seeing bulges in the pockets of the shorts the Defendant was wearing. Officer David Estes asked the Defendant if he had any weapons and Defendant stated he had a knife in his pocket. Officer Estes removed items from the Defendant's pocket, one item being a gray pouch, and laid them on the hood of the car. After removing all the items from the Defendant's pockets, Officer Estes opened the gray, zippered pouch and found two brown glass vials containing an off-white granular substance. The Defendant was then placed under arrest. While Officer Estes was dealing with the Defendant, two passengers were removed from the vehicle. One passenger was Delaine Berg. An automatic handgun was found under his seat.

4. In Wright v. State, 300 Ark. 259 (1989), the Arkansas Supreme Court held that drugs found as the result of a frisk during an investigatory stop were admissible. The Court stated that a limited search incident to a lawful stop must at times be performed expeditiously. The Court held that evidence found as the fruit of a reasonable and lawful pat down search is properly admissible even if such evidence is not a weapon.

5. Based on the totality of the circumstances the Fulton County Sheriff's Department had sufficient probable cause to stop the Defendant's vehicle in an investigatory stop. The warrantless search of the Defendant's person was reasonable. The Defendant's Motion to Suppress Evidence will be denied.

IT IS SO ORDERED.

/S/ John Dan Kemp .
HONORABLE JOHN DAN KEMP
CIRCUIT JUDGE

DATE: May 14, 1997

APPENDIX B

Argument section of Petitioner's brief before the Arkansas Court of Appeals.

ARGUMENT

I. THE TRIAL COURT ERRED BY INTRODUCING OVER THE OBJECTION OF BATES, EVIDENCE WHICH WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT.

Bates moved pre-trial to suppress the methamphetamine and the marijuana and all other evidence derivative thereof or connected thereto on the grounds that the stopping of the U-Haul truck was illegal and without warrant or probable cause. The testimony pretrial and at trial showed that the U-Haul truck was in fact stopped based on suspicion and nothing more. There was no "reasonable suspicion" or probable cause and, therefore, the mere stopping of the U-Haul truck was illegal and the seizure of the methamphetamine and marijuana thereafter as alleged was a product of the unlawful stop, detention and subsequent search, and a violation of the Fourth Amendment and applicable provision of the Arkansas State Constitution. However, the defendant not only contends that the initial stopping of the U-Haul truck was illegal, but also the pat-down search of Bates could only be accomplished if he was "armed and dangerous" and thus the pat-down was illegal. In fact, the detention itself was unlawful. However, assuming that the stopping of the vehicle was lawful and assuming arguendo that the detention and pat-down was lawful, the officers did not have permission to open the container found in the pocket of the shorts of Bates upon pat-down after he was ordered from the vehicle. Perhaps ordering the driver, if stopped for a pretended traffic violation, was not an impermissible seizure. Perhaps a frisk upon observing an alleged bulge in the shorts was (also) justified. But there was no justification under the Constitution of the United States as well as the Constitution of the State of Arkansas to actually unzip the two inch by three inch pouch and search its contents. The officer could only search

"reasonably" for a firearm: "pat down". [Elephants don't hide in closets and firearms are not contained in 2 x 3 inch zippered pouches!!]

Bates below relied upon *Brunson v. State*, 54 Ark. App. 248, 925 S.W.2d 434 (1996); however, as pointed out by the trial judge below, the Arkansas Supreme Court on March 17, 1997, reversed this Arkansas Court of Appeals decision. Also (below) His Honor cited *Wright v. State*, 300 Ark. 259, 778 S.W.2d 944 (1989) as authority for the denial of the motion to suppress. *Wright* held that a limited search incident to a lawful stop must at times be performed expeditiously, holding that drugs found as a result of a frisk during an investigatory stop was admissible. Nevertheless, despite our contention the stop was not "lawful," nor the detention, nor the "pat-down," we submit that the recent decision *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997), is directly in point and ample authority to hold the seizure unlawful under the Fourth Amendment. In reversing a Pulaski County Circuit Court, *Stewart* held that "...after this protective search, the officer went beyond mere protection" holding

> We see nothing in the record to suggest that the matchbox taken from appellant's pocket contained a weapon or posed a risk to the officer's safety. Even if this is a high-crime area, without some evidence other than suspicion or a hunch that a matchbox contains a controlled substance, it is patently inappropriate for an officer, under the guise of maintaining his or others' safety, to take a matchbox and open it. This was not a search incident to arrest. A protective search must be no more invasive than is necessary to ensure the officer's safety; looking inside the matchbox ensured no more safety to the officer. (Emphasis added.)

As the United States Supreme Court in *Terry* stated:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Terry, 392 U.S. at 9, citing *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891).

The Court went on to state:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

[citing *Terry*, 392 U.S. at 15]

For this, if no other reason, the search below fails and the convictions should be set aside. The officer had no authority to open the small zippered pouch in the front pocket of Bates's shorts. [He was wearing shorts.] Pat him down – yes (maybe). But not to unzip the small pouch containing the small vials. See, also,

United States v. Millan, 912 F.2d 1014 (8th Cir. 1990). The conviction in *Millan* was reversed because evidence was obtained from an unlawful search of a jacket and a garment bag. The belief that jacket pockets contained narcotics was "too slender a reed" to justify even the seizure of the person. *Id.* The initial seizure was held unlawful.

Bates thus contends that he was arrested illegally and without cause and in violation of the Constitution of the United States. This arrest was without probable cause and since all arrests must be based upon probable cause, this seizure was illegal in violation of the Fourth Amendment. The general rule is that every arrest and every seizure having the official attributes of a formal arrest is unreasonable unless it is supported by probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). The general rule is that seizures of the person require probable cause to arrest. *Florida v. Royer*, 460 U.S. 491, 499 (1983).

Bates was followed in his vehicle at night apparently by "the police" and he was stopped without cause whatsoever based on mere suspicion. The officers had no "reasonable and articulable basis" for the investigative stop of the U-Haul truck. Police may briefly stop and question a person whom they reasonably suspect of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20-23 (1968); *United States v. Abhokai*, 829 F.2d 666, 669-70 (8th Cir. 1987), *cert. denied*, 485 U.S. 907 (1988). But the law enforcement officer(s) must identify particular facts and rationally draw inferences from those facts that, when viewed under the totality of the circumstances, create a reasonable suspicion of criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989).

There was no probable cause for a warrantless arrest. That is, the officers did not have reasonably trustworthy information that justified a prudent person believing that the person detained had committed an offense. See *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *United States v. Danielson*, 728 F.2d 1143, 1146 (8th Cir.),

cert. denied, 469 U.S. 919 (1984). In establishing probable cause, law enforcement officers enjoy substantial latitude in interpreting and drawing inferences from factual circumstances. See, e.g., *United States v. Tussa*, 816 F.2d 58, 62 (2d Cir. 1987).

The U-Haul rental vehicle in Bates's possession was searched following his arrest. The officers relied upon nothing in determining that they had probable cause to make a warrantless search of the vehicle under the so-called automobile exception. See *California v. Acevedo*,[1] 500 U.S. 565 (1991). Probable cause for an automobile search exists if the facts and circumstances known to the police when they began the search were "sufficient in themselves" for a person of "reasonable caution" to believe that contraband or evidence of criminal activity was in the vehicle. *United States v. Caves*, 890 F.2d 87, 90 (8th Cir. 1989).

> Our society will survive if some criminals go free, but it will not survive if the very principles upon which our society is founded are undermined and broken. It is desirable that criminals be caught. It is necessary that a large percentage of them be caught. But it is far more important that in pursuing criminals the Constitution itself not be violated. Our society can tolerate only a very little of that. If the police officer in his zeal to catch the criminal violates the Constitution and thus himself ceases to be governed by laws and a Constitution, it becomes a society governed by the decisions of individual police officers in the pursuit of crime. In that kind of society the police constitute the power, and they are feared. It is not a free society.
>
> Sokol, The Law-Abiding Policeman, 9-10 (1969)

Judges are the keepers of the sacred flame, the enforcers of the values written into the Bill of Rights by its framers. The Fourth Amendment demands of law enforcement good things like warrants, probable cause, exigency, and police good faith. They all, however, are but the subcriteria by which we measure something else: reasonableness. For Fourth Amendment purposes, the police have to be reasonable when they search and when they seize because the Fourth Amendment demands it.

THE UNLAWFUL STOP OF THE U-HAUL TRUCK

A seizure occurs whenever a vehicle is stopped. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The Fourth Amendment applies. *Id.* A brief investigatory stop of a vehicle is also a seizure of the person of the occupants. *United States v. Cortez*, 449 U.S. 411, 417 (1981). See, also, *United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993); *United States v. Bloomfield*, 40 F.3d 910, 916 (8th Cir. 1994).

There must be reasonable suspicion to justify an investigatory stop of a vehicle. *Delaware v. Prouse*, *supra*, at 661, 663.

The *Terry* rationale allows police to stop a moving vehicle based on a reasonable suspicion that its occupants are violating the law. *United States v. Diaz-Lizaraza*, 989 F.2d 1216, 1220 (11th Cir. 1993). There must be a "reasonable, articulable suspicion" that the person has been, is, or is about to be engaged in criminal activity. *United States v. Thomas*, 992 F.2d 201, 203 (8th Cir. 1993). See, also, *United States v. Braggs*, 23 F.3d 1047, 1049 (6th Cir. 1994); *United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994); *United States v. Halls*, 40 F.3d 275, 276 (8th Cir. 1994).

There was no "reasonable suspicion" to stop the vehicle and, therefore, the seizure was in violation of the Fourth Amendment applicable to the states via the Fourteenth Amendment Due Process Clause. The evidence seized was obtained illegally and should be suppressed and all fruits thereof.

THE ILLEGAL DETENTION OF THE OCCUPANTS OF THE U-HAUL TRUCK AFTER THE STOP

Additional questioning that goes beyond the original purpose of the stop must be supported by additional reasonable suspicion. *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994); *United States v. Bloomfield, supra*, at 918. See *United States v. White*, 42 F.3d 457, 460 (6th Cir. 1994) and *United States v. Ramos*, 20 F.3d 348, 352 (8th Cir. 1994).

There were no facts or circumstances to justify under the Fourth Amendment detaining the occupants after the initial conversation and investigation. In fact, Bates was simply stopped and arrested by armed officers with force who immediately searched him and his passengers, and who then went on a "fishing expedition" based simply upon mere suspicion.

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[1] In *Acevedo*, Justice Scalia made this prophetic observation: "Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator catalogued nearly 20 such exceptions, including 'searches incident to arrest ... automobile searches ... border searches ... administrative searches of regulated businesses ... exigent circumstances ... boat boarding for document searches ... airport searches ... school searches ... .' Since then, we have added at least two more ... searches of mobile home ... [and] searches of offices of government employees." *California v. Acevedo*, at 582. (Scalia, J., dissenting).

THE ILLEGAL PAT DOWN-SEARCH OF THE PERSON OF JOHN MICHAEL BATES

The stop and frisk exceptions are products of *Terry v. Ohio* (1968) *supra*, and *Sibron v. New York*, 392 U.S. 40 (1968). A stop is a seizure of the person. A frisk is a search of the person. Because both of these lesser intrusions infringe sufficiently on a citizen's right not to be stopped and not to be frisked, they fall within the coverage of the Fourth Amendment and must be reasonable to be permitted. Because, however, they are less intrusive than full-blown seizures and searches of the person, they may be deemed reasonable upon predicates less substantial than that of probable cause. The newly articulated (less substantial) predicate is now called "articulable suspicion": sometimes, good cause to believe; sometimes reasonable suspicion; and, sometimes, particularized suspicion.

Although the stop and the frisk require the same quantitative justification of articulable suspicion, they require different qualitative justifications. Because the governmental purpose of the stop is crime-related, the predicate for a stop must be articulable suspicion that (1) a crime has occurred; or (2) is then occurring; or (3) is about to occur. Because the governmental purpose of the frisk, however, is to protect the life and limb of the stopping officer, the predicate for the frisk is articulable suspicion that the person stopped may be armed.

The scope limitation on the stop is that it remain right at the spot or within very close proximity to where the stop first occurred. The temporal scope limitation is that the stop only last a little while. The scope limitation on the frisk is that it be confined to the pat-down of the clothing surface of the person being frisked. That is all that is required to detect the presence of offensive weapons. That is all that is necessary, therefore, to serve the purpose of the frisk.

Minnesota v. Dickerson, 508 U.S. 366 (1993) recognized, by way of analogy to the Plain View Doctrine, the concept of a plain feel doctrine. [Its rationale seemingly would expand *Coolidge's* second requirement to embrace all of the senses and not merely that of sight.]

Thus the police may take only reasonable actions to protect themselves assuming arguendo a lawful stop and detention. See. e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977): officer may order driver to get out of vehicle without violation of the Fourth Amendment.[2] They may check for weapons. *United States v. Thomas, supra*, at 203-204. They may order occupants out

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[2] In *Maryland v. Wilson*, decided February 19, 1997, a Maryland state trooper pulled over a passing car for speeding and displaying no proper license plate. During his pursuit of the car, the trooper noticed that there were three occupants of the vehicle and that the two passengers turned to look at him several times, repeatedly ducking below sight level and then reappearing. When the car stopped and the trooper approached in on foot, the driver got out and met him halfway. The trooper, after examining the driver's license, instructed the driver to return to the car and produce the car rental documents. When the driver complied, the trooper noticed that the front-seat passenger, Wilson, was extremely nervous. As the driver looked for the rental papers, the trooper ordered Wilson out of the car. When Wilson got out, crack cocaine fell to the ground, for the possession of which Wilson was arrested and prosecuted. Wilson moved to suppress, claiming that the trooper's order to him to get out of the car was violative of the Fourth Amendment, and that the cocaine was the fruit of that order. The issue was whether the rule of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well, and the Supreme Court concluded that the concerns for officer safety that made the conduct in *Mimms* reasonable for Fourth Amendment purposes were applicable. [The additional intrusion into Fourth Amendment protected interests occasioned by ordering the passenger, who has already been stopped, to exit the car, was said to be minimal.]

using drawn weapons when those actions are reasonably necessary. *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993). The test for the scope of the activity is whether the surrounding circumstances give rise to a justifiable fear for personal safety. *Id.* They may frisk for weapons depending on the circumstances. *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991). See, also, *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991).

Each case turns on its unique facts. *United States v. Watts*, 7 F.3d 122, 125 (8th Cir. 1993). Limited intrusion depending on the circumstances are reasonable. *Adams v. Williams*, 407 U.S. 143, 148 (1972); see, also, *New York v. Class*, 475 U.S. 106, 116 (1986). If an arrest procedure is initiated prematurely, going beyond what was necessary to protect the officer's safety, the seizure is unreasonable and in violation of the Fourth Amendment. *United States v. King*, 990 F.2d 1552, 1563 (10th Cir. 1993). The interior compartments of the vehicle can be searched if the officers have a reasonable suspicion that it contains weapons dangerous to the officers. *Michigan v. Long*, 463 U.S. 1032, 1034-35 (1983). There must be specific and articulable facts in support of a reasonable belief that the suspect is dangerous. *United States v. Gleason*, 25 F.3d 605, 608 (8th Cir. 1994); *United States v. Watts*, 7 F.3d 122, 125 (8th Cir. 1993).

However, an overly intrusive stop may constitute an arrest requiring probable cause. See *United States v. Sharpe*, 470 U.S. 675, 686, 688 (1985).

In the *United States v. Raino*, 980 F.2d 1148, 1149-50 (8th Cir. 1992) five factors were set forth to determine if an investigative stop elevates into arrest to determine reasonableness. In *United States v. Walker*, 933 F.2d 812, 816 (10th Cir. 1991) and *Oliveira v. Mayes*, 23 F.3d 642, 646 (2d Cir. 1994) the detentions were held not reasonable and in violation of the Fourth Amendment. See,

also, *United States v. Del Vizo*, 918 F.2d 821, 825 (9th Cir. 1990) as the investigatory stop was converted illegally into an arrest.

PRETEXT STOPS

In *Whren v. United States*, 116 S.Ct. 1769 (1996), plainclothes police officers in the District of Columbia were patrolling a known drug area in an unmarked car. They observed a Pathfinder truck stopped at a stop sign for what seemed like an unusual length of time. The occupants of the Pathfinder were "youthful" and "the driver [was] looking down into the lap of the passenger." When the officers made a U-turn to head back toward the Pathfinder, the Pathfinder pulled away at what the officers described as an unreasonable rate of speed. The officers subsequently pulled the Pathfinder over, ostensibly to give the driver a warning concerning such traffic violations as failure to "give full time and attention to the operation of the vehicle," 18 D.C.Mun.Regs 2213.4; "turn[ing] any vehicle ... without giving an appropriate signal," § 2204.3; and driving "at a speed greater than is reasonable and prudent under the conditions," § 2200.3. When one of the officers approached the truck, he saw what he recognized as crack cocaine. At a motion to suppress, Whren argued that the stop of his vehicle was pretextual, and that the fruit of that stop was subject to suppression.

The issue before the Supreme Court:

> Whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.

The Court rejected "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." If the officer has probable cause to make a traffic stop, *Whren* holds it is irrelevant to the constitutional analysis that the police may have been merely exploiting the traffic code as a means to investigate drug or other crime!!!

SCOPE OF A TERRY FRISK

The authority to frisk a suspect has been limited to the situations where "officers reasonably" believe that the suspect is armed. Self-defense is the rationale of the *Terry* stop and the most compelling justification. *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996). See, also, *United States v. Padro*, 52 F.3d 120 (6th Cir. 1995).

The frisk must target weapons only. See *United States v. Ponce*, 8 F.3d 989, 999 (5th Cir. 1993) and *United States v. Gibson*, 19 F.3d 1449, 1451 (D.C. Cir. 1994). In *Minnesota v. Dickerson*, 508 U.S. 366 (1993):

> The purpose of this limited search if not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. ... (citations omitted). Rather, a protective search – permitted without a warrant and on the basis of reasonable suspicion less than probable cause – must be strictly limited to that which is necessary for the discover of weapons which might be used to harm the officer or others nearby. (citations omitted). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. (citations omitted) (emphasis added).

In creating what has been termed the "plain-feel" doctrine, the Supreme Court held in *Dickerson* that an officer who conducts a pat-down search that stays within the parameters marked by *Terry* may seize non-threatening contraband as long as the identity of that contraband is immediately apparent to the officer without conducting some further search of the object. Drawing from the "plain-view" cases, the *Dickerson* court further defined the limits of its decision by reminding that police may seize contraband in plain view only when doing so does not intrude into anyone's privacy any more than the police are already authorized to do:

> If, however, the police lack probable cause to believe that an object in plain view is contraband without conducing some further search of the object ... the plain-view doctrine cannot justify its seizure.
>
> *Id.* 113 S.Ct. 2137
>
> (emphasis added)

The *Dickerson* court suppressed the contraband seized from the defendant, holding that the police officer overstepped the bounds of a search for weapons allowed under *Terry* by squeezing and manipulating a lump in the suspect's pocket prior to determining that it was contraband. See, also, *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (applying *Dickerson*, the court suppressed the money found in a brown paper bag seized from Schiavo holding that the officer's continued exploration of the bag went beyond that allowed in *Terry* because the incriminating nature of the bulge was not immediately apparent.)

One court applying *Dickerson* expressed its skepticism of police testimony on this point. In *United States v. Fernandez*, (S.D.N.Y. Aug. 16, 1996), the district judge suppressed drug evidence seized during a *Terry* frisk. The officer testified that as he frisked the suspect and tapped on the suspect's pocket, he heard

a "plasticky" crinkling sound. The officer questioned the suspect about it and, according to the officer, the suspect replied that it was "weed." Impressed by defense counsel's successful "impeachment by omission" and impeachment with a prior inconsistent statement in the officer's report, the district judge found the police officer's testimony "unconvincing"!!! The district judge suppressed the drug evidence, concluding that the officer had no reasonable suspicion, much less probable cause, to believe that the object in the suspect's pocket was contraband.

When officers come upon an opaque container in the course of an investigatory stop, a warrant may be required before officers may invade the privacy of the package (e.g., Bates's small zippered pouch in his pocket). This principle follows from *United States v. Jacobsen*,[3] 104 S.Ct. 1652 (1984), in which the Court wrote:

> Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.
>
> Even when government agents may lawfully seize

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[3] In *Jacobsen*, Federal Express employees opened a damaged package and found plastic bags of white powder inside. They notified the Drug Enforcement Administration. Responding to the call, a DEA agent field tested the powder which tested positive for cocaine and the defendant was subsequently arrested. *Id.* at 1655. Although the Supreme court held that the agent's search of the tubular package was reasonable because the agent's search did not go beyond that of the private search, the Supreme Court made it clear that warrantless searches of containers are presumptively unreasonable. *Id.* at 1657.

> such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.
>
> *Id.* (emphasis added)

A recent decision by the court of criminal appeals in Alabama applied the analysis articulated by the Supreme Court in *Jacobsen:* Seely v. State, 669 So.2d 209 (Ala. Cr. App. 1995). With the factual situation being almost identical to that in *Jacobsen* – the decisive exception that the Federal Express employees in *Seely* did not open the tube – the *Seely* court held that the search by police officers was unreasonable and in violation of the Fourth Amendment. Focusing on an officer's (Ware) action in cutting open the package, the court explained:

> Ware should have obtained a search warrant before cutting open the tubular package that contained cocaine. Ware had probable cause to obtain a search warrant based on his observations and on the results of the sniff test by the narcotics detection dog. Because Ware had dominion and control over the package, there was little chance of loss or destruction of the package. There were no exigent circumstances that justified opening the package before obtaining a search warrant. *Id.* at 214 (emphasis added).

Quite simply in this case, the search of the zippered pouch under the specific circumstances herein was improper and unlawful. Therefore, the controlled substances should have been suppressed, and further, the convictions of Bates should be set aside and the charges dismissed.

II. THE TRIAL COURT ERRED BY INTRODUCING INTO EVIDENCE THE ALLEGED CONTROLLED SUBSTANCE WITHOUT REQUIRING THE STATE TO MEET THEIR BURDEN OF PROVING SUFFICIENT LINKS IN THE CHAIN OF CUSTODY.

Over Bates' strenuous objection, the trial court introduced into evidence the alleged controlled substance, point four four eight nine (.4489) grams of methamphetamine, without requiring the State to properly authenticate the substance by proving the necessary links in the chain of custody. Bates never waived any requirement of authenticity. Rule 901, Ark. R. Evid., requires:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Under the specific facts of this case, the chain of custody was insufficient because there was evidence the methamphetamine introduced at court was not the same alleged substance taken from Bates.

This Court has routinely stated that the proof of chain of custody for interchangeable items like drugs or blood, needs to be more conclusive. *Lee v. State*, 326 Ark. 229, 931 S.W.2d 433 (1996); *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988); and *Brewer v. State*, 261 Ark. 732, 551 S.W.2d 218 (1997). The purpose of establishing chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Lee v. State, supra*. In this case, the State was required to submit sufficient reliable evidence to prove that the controlled

substance had not been tampered with. Bates' counsel acknowledge that minor uncertainties in the proof in the chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence admissible as a matter of law. See *Gardner v. State, supra.* In this case, however, the missing links in the chain of custody were substantial, and the other factors listed above and below require that the alleged controlled substance not be admitted or considered by the trier of fact.

The basic facts in this case included the following: Deputy Estes on August 4, 1996, at approximately 2:00 a.m. allegedly retrieved from Bates' front, left, short's pocket a zippered pouch, which contained two brown vials. The two brown vials allegedly each contained a quantity of methamphetamine. Deputy Estes testified that he recovered the brown vials from Bates' pocket, that he put the evidence in the police lock up locker. (R. 258) That the evidence allegedly stayed in the evidence locker until it was transported to the State Crime Lab, but that he did not have any knowledge as to how the evidence got to the State Crime Lab. (R. 260) Chemist Kathy Shanks testified only that a substance was received in the State Crime Lab which was allegedly hand-carried by Sheriff Jack Collins, deceased, prior to trial. Chemist Shanks apparently received two separate samples of methamphetamine. One, which was for an unknown reason, not available at trial, contained five point seven two one seven (5.7217) grams of a hard, off-white like substance. This substance contained ~~allegedly~~ sixteen point seven percent (16.7%) methamphetamine hydrochloride. (R. 169) Again, for an unknown reason, this substance was not available during trial, and therefore, was not permitted into evidence. The second alleged controlled substance, which was introduced into evidence, consisted of an off-white powder weighing a total of point four four eight nine (.4489) grams which contained methamphetamine hydrochloride and the dimethyl sulfone. Chemist Shanks testified

that the off-white powder was allegedly in one of the brown vials. Chemist Shanks did not perform a quantitative analysis of the methamphetamine hydrochloride and dimethyl sulfone so she could not testify what percentage of the substance was methamphetamine. (R. 186)

Chemist Shanks could not tell from personal knowledge how these substances were delivered to the Crime Lab nor how the substances were transported from the Crime Lab to the Fulton County Sheriff's Department. (The witness guessed the substance was hand-carried by deceased Sheriff Jack Collins to the Crime Lab, and that the substance was shipped by UPS from the Crime Lab back to the Fulton County Sheriff's Department.) Deputy Estes did not attempt to testify that the substance in Court was the same substance he retrieved from Bates. Further, Deputy Estes could not explain the missing substance. Deputy Estes described the substance originally as granular, and not as a powder. (R. 272)

As authority, Bates relies upon two significant recent Arkansas Supreme Court cases, namely: *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997) and *White v. State*, 330 Ark. 813, ___ S.W.2d ___ (1997). The fact that the controlled substance changed from granular to powder is significant. More significant is the fact that five point seven two one seven (5.7217) grams of the controlled substance was unaccounted for without any explanation. Even more significant were the missing links in the chain of custody. Sheriff Jack Collins who allegedly hand-delivered the substance from the Fulton County evidence locker to the State Crime Lab was unavailable and did not testify. The controlled substance changed from an off-white granular substance to an off-white powder. All of these factors together certainly create a significant possibility that the evidence tested was not the same as that allegedly taken from Michael Bates. It should be emphasized that Bates did testify and denied ever

possessing any controlled substance whatsoever. The facts of this case are squarely on point with the facts in *Crisco v. State* and *White v. State, supra*. The alleged controlled substance simply should not have been admitted into evidence.

III. THE TRIAL COURT ERRED BY NOT REQUIRING THE STATE TO PROVE THE ALLEGED CONTROLLED SUBSTANCE CONTAINED A USABLE AMOUNT OF METHAMPHETAMINE.

Bates at the conclusion of the State's evidence and at the conclusion of all the evidence properly moved to dismiss the charges because the State of Arkansas did not prove Bates possessed a usable amount of methamphetamine. Specifically, the only substance introduced at the trial was point four four eight nine (.4489) grams of a off-white powder substance that allegedly contained methamphetamine hydrochloride and dimethyl sulfone. (R. 179) Chemist Shanks did not perform a quantitative analysis to determine which portion of the powder substance was methamphetamine hydrochloride or dimethyl sulfone. (R. 186) Chemist Shanks did testify she was not aware of any taste test for methamphetamine. She testified she could not see methamphetamine hydrochloride without some type of laboratory test. She further testified she could not tell what it would take to be classified as a usable amount of methamphetamine.

The Arkansas Supreme Court held in *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), that in simple possession of controlled substance cases it is not illegal to possess less than a usable amount of a controlled substance primarily because legislators did not intend to criminalize less than a useable amount. Less than a usable amount cannot contribute to future conduct at which the legislation is aimed which is use of trafficking in drugs. In this particular case, Bates was convicted only of possessing

methamphetamine. The drugs were allegedly found in a zippered pouch in his front pocket.

The State failed to offer any evidence whatsoever to prove beyond a reasonable doubt that the portion of the white powdery substance identified as methamphetamine was (1) sufficient to permit knowledge of its presence without the need for scientific identification, or (2) sufficient to be usable in the manner in which such a substance is ordinarily used. Therefore, the charge of possessing methamphetamine should be dismissed because of insufficient evidence.

IV. THE TRIAL COURT ERRED BY IMPOSING OVER DEFENDANT'S OBJECTION MULTIPLE RESTRICTIVE CONDITIONS OF PROBATION WHEN THE JURY ONLY IMPOSED A TEN THOUSAND DOLLARS ($10,000) FINE AND NO ADC TIME.

Bates was sentenced pursuant to the bifurcated sentencing procedure set forth in Ark. Code Ann. § 16-97-101 et. seq. During this sentencing phase, the jury was instructed to complete three separate verdict forms. The first form for possession of methamphetamine allowed the jury to impose a sentence of from three (3) to ten (10) years in the ADC, or up to a Ten Thousand Dollars ($10,000) fine, or both a term of imprisonment and a fine. The second verdict form on possession of marijuana allowed the jury to impose a sentence in the Fulton County Jail from zero (0) to three hundred sixty-five (365) days or a fine up to One Thousand Dollars ($1,000), or both a term in the Fulton County Jail and a fine. The third verdict form was drafted pursuant to AMCI 2d 911 and Ark. Code Ann. § 16-97-101(4). This third verdict form simply allowed the jury to make a non-binding recommendation to the Court that Bates should receive an

alternative sentence of probation for a period ranging from three (3) to ten (10) years.

The jury answered all three verdict forms. On the possession of methamphetamine charge, the jury required no ADC time, but instead, imposed only a fine of Ten Thousand Dollars ($10,000). (The possession of marijuana charge is irrelevant to this argument.) The jury did make a unanimous non-binding recommendation that Bates receive five (5) years probation. The jury was given no instruction whatsoever regarding the conditions of probation, and neither the State nor the defense attorneys ever discussed any possible conditions of probation.

The trial judge set a sentencing hearing to be held November 12, 1997. Both the State and Bates filed post-trial motions. At the sentencing hearing Bates objected to any condition of probation, and simply requested the trial judge to enter Judgment pursuant to the jury's verdict in the amount of Ten Thousand Dollars ($10,000) fine. Trial Judge Kemp, however, decided to accept the jury's non-binding recommendation and placed Bates on five (5) years supervised probation subject to numerous and onerous conditions. See Addendum.

Ark. Code Ann. § 16-97-101 titled, "Bifurcated Sentencing Procedures," specifically states:

> The following procedures shall govern jury trials which include any felony charges:
>
> (1) The jury shall first hear all evidence relevant to every charge on which a defendant is being tried and shall retire to reach a verdict on each charge.
> (2) If the defendant is found guilty of one or more charges, the jury shall then hear additional

> evidence relevant to sentencing on those charges. Evidence introduced in the guilt phase may be considered, but need not be reintroduced at the sentencing phase.
> (3) Following the introduction of additional evidence relevant to sentencing, if any, instruction on the law, and argument, the jury shall again retire and determine a sentence within the statutory range.
> (4) The Court, in its discretion, may also instruct the jury that counsel may argue as to alternative sentences for which the Defendant may qualify. The jury, in its discretion, may make a recommendation as to an alternative sentence. However, this recommendation shall not be binding on the Court. (Emphasis added.)

AMCI 2d 9111 titled "Stage II: Closing Instruction," was given to the jury on the issue of an alternative sentence. The notes on use following AMCI 2d 9111 list two separate procedures the Court can use to permit a jury to recommend probation. This note was specifically discussed between the attorneys and the Court prior to the instructions being read to the jury at the sentencing phase. The Court and counsel for both the State and the defense agreed the second alternative would be used. The two alternatives are defined as follows:

> First, if the trial court permits the jury to consider alternative sentencing in addition to the ordinary sentencing options and the jury returns an alternative sentence, the Court may, prior to discharging the jury, decide if it will accept the alternative sentence. If the Court accepts the alternative sentence, then the jury may be discharged. If the Court exercises its discretion not

> to accept the alternative sentence, it should instruct the jury to resume its sentencing deliberations.
>
> A second way of proceeding is for the Court to require that the jury complete two forms, one imposing an alternative sentence and the other imposing an ordinary sentence of imprisonment, a fine, or both. If the Court declines to follow the alternative sentence recommendation of the jury, there will be a basis, *vis*. The other complete verdict form, for a sentence.
>
> AMCI 2d 9111, as now framed, adopts the later approach. A Court wishing to adopt the first approach should delete the last paragraph of the bracketed material. (Emphasis added.)

It must be emphasized that the recommendation of probation is not binding. The Court cannot impose terms and conditions of probation too onerous or Bates can simply reject same. This is true because in Arkansas a jury imposes the sentence and in this case, the jury did not impose a sentence of probation, but merely recommended to the parties that Bates be placed on probation. Prior to sentencing, Bates elected not to be placed on probation, but instead, to simply be given a payment plan under which he could pay his Ten Thousand Dollars ($10,000) fine. The Court used its discretion and exceeded its authority when it set aside the Ten Thousand Dollars ($10,000) fine imposed by the jury and accepted the non-binding recommendation of five (5) years probation.

Certainly, the trial court arguably may have had authority to impose conditions of probation on Bates, if conditions had been discussed between the State and Bates prior to submitting the issue to the jury, or if the jury had returned specific

recommendation as to what conditions, if any, should be placed on Bates as part of any probationary period. This simply never occurred.

Apparently, this is an issue of first impression in the State of Arkansas. Moreover, it is confusing to say the least, what will happen in the event Bates' probation is revoked. Bates would submit that because the jury decided no ADC time should be imposed for Bates' criminal violation, that Bates could not be sentenced to the Arkansas Department of Corrections or any term of imprisonment. However, pursuant to the conditions of probation, attached hereto in the addendum, if Bates' probation is revoked, the State may very well argue Bates should be incarcerated in the Arkansas Department of Corrections. This will clearly violate the Arkansas Constitutional requirement that Bates' punishment be set by jury.

CONCLUSION

Bates does not request a new trial. Instead, for the above stated reasons and based upon the authority cited herein, Bates requests that the Judgment, convictions, and sentence, entered against him be set aside and vacated by this Appellate Court. Bates respectfully submits that the evidence submitted against him is insufficient as a matter of law because (1) the evidence was obtained illegally in violation of his Fourth Amendment and without this evidence, there can be no conviction; (2) the evidence as to the methamphetamine possession conviction is insufficient because of a failure to show a usable amount; and (3) the chain of custody requirement was not met and therefore, without the physical evidence, there can be no lawful conviction as the evidence is insufficient. Alternatively, Bates prays that the sentence of probation be set aside and vacated and that he be sentenced pursuant to the jury's verdict of a Ten Thousand Dollars ($10,000) fine with an appropriate payment plan.

APPENDIX C

Argument section of Respondent's brief before the Arkansas Court of Appeals.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED BATES'S MOTION TO SUPPRESS EVIDENCE.

A jury convicted the appellant, John Michael Bates, of the crimes of possession of methamphetamine and possession of marijuana. For his first issue on appeal, he contends that the trial court erred in denying his motion to suppress evidence. Specifically, he argues that his vehicle was illegally stopped and that the search of his person was improper. His argument is meritless.

At the suppression hearing, Fulton County Sheriff Jack Collins testified that during the early morning hours of August 4, 1996, he stopped a U-Haul truck driven by Bates because a headlight was out on the truck. (R. 421-423) Collins testified that he knew through Arkansas State Police Investigator Steve Huddleston that Bates often accompanied Delane Berg, who carried a firearm and had been arrested in Bates's vehicle in Arizona with methamphetamine and a firearm. Collins testified that he recognized Bates when Bates stepped out of the truck. He moved Bates to the back of the truck and told Deputy David Estes to frisk him and make sure he did not have any weapons on him. Collins testified that he went back to the cab of the truck, and Hazel Bates was seated in the middle of the cab of the truck, and Delane Berg was on the passenger side and had a semi-automatic handgun beneath his seat. (R. 423-24)

Deputy David Estes testified that he saw bulges in Bates's pockets. For his safety, he asked Bates to put his hands on the patrol car. He then performed a pat-down search. In the front left pocket of Bates's shorts, Estes found a gray pouch with a

zipper down the center of the pouch. Inside the pouch were two brown glass vials. Inside the vials was an off-white granular substance, subsequently determined to be methamphetamine. He also found marijuana in the pouch. (R. 451) On cross examination, Estes testified that when he asked Bates to put his hands on the car, he also asked Bates if he had any weapons with him, and Bates told him that he had a knife in his front pocket. (R. 455) Estes further testified that the gray pouch was three or three-and-a-half inches, close to the size of a billfold. (R. 456) During questioning by the trial court, Estes testified that he took the pouch out of Bates's pocket and laid it on the hood of the patrol car. After the pat-down was completed, he looked through the pouch and found the two glass vials. He then handcuffed Bates. (R. 458-59) Estes found a knife in Bates's right pocket. (R. 460)

Because driving without a headlight is a misdemeanor, *see* Ark. Code Ann. § 27-36-101 (Repl. 1994), Collins properly stopped the truck, as a police officer may stop and detain a motorist where the officer has probable cause to believe that a traffic violation has occurred. *See Travis v. State*, 331 Ark. 7, 9-10, 959 S.W.2d 32, 34 (1998). Because Bates committed the misdemeanor and could be arrested for that offense, he and his personal effects could be searched incident to an arrest. *See Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997)(approving of a search incident to an arrest for traffic offenses). Consequently, the trial court properly denied Bates's motion to suppress.[1]

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[1]The officers could also have searched Bates and the pouch in Bates's pocket for weapons based on the belief that Bates was armed and dangerous, as Bates admitted to possessing a knife prior to the search and the officers knew of Berg's arrest while carrying a weapon in Bates's vehicle. *See Shaver v. State*, 332 Ark. 13, ___ S.W.2d ___ (1998).

II.

THE STATE ESTABLISHED THE CHAIN OF CUSTODY OF THE METHAMPHETAMINE.

Bates contends that the State failed to establish the chain of custody of the methamphetamine. He argues that the chain of custody was insufficient because there was evidence that the methamphetamine introduced at trial was not the substance that was taken from him. Specifically, he notes that the person who transported the methamphetamine to the Arkansas State Crime Laboratory died prior to trial, that the chemist described the methamphetamine as powder while the deputy who seized the methamphetamine described it as granular, and that some evidence examined by the chemist was missing and was not introduced at trial.

Kathy Shanks, a forensic chemist with the Arkansas State Crime Laboratory, testified that she received at the laboratory a plastic bag containing a gray zippered pouch which contained two brown glass vials each containing an off-white powder. She also received in the pouch a plastic bag containing a hard off-white rock-like substance. (R. 160-61) That bag, however, was not at trial, and though Shanks determined that the substance was 5.7217 grams of methamphetamine hydrochloride, the State did not ask for it to be admitted into evidence. (R. 175) On voir dire, she testified that according to the submission sheet, Jack Collins, who was deceased at the time of trial, hand-delivered the evidence to the laboratory's evidence receiving department. (R. 167-68) She further testified that computer records showed that the evidence was subsequently mailed back to the sheriff's office. (R. 170-71)

Fulton County deputy sheriff David Estes testified that on the day of Bates's arrest he removed from Bates's left front pocket

a gray zippered pouch. (R. 254) He recognized the pouch admitted into evidence as the pouch he took from Bates. (R. 255-56) He also recognized the vials as the items he found in the pouch. (R. 256) Estes further testified that he put the items in a plastic bag and kept them in his possession until he secured them in the evidence locker at the sheriff's office. (R. 258) On cross-examination, Estes admitted that in a receipt he wrote he described the substance found in the vials as granular, but that there was no difference that he was aware of between describing it as granular or powder. (R. 272) He also testified that he described the evidence in a written receipt as a pouch containing two brown glass vials with an off-white granular substance inside the vials. (R. 276)

The purpose of establishing chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Crisco v. State*, 328 Ark. 388, 391-92, 943 S.W.2d 582, 584-85 (1997). The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with, but it is not necessary for the State to eliminate every possibility of tampering. *Id.* Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law. *Id.* Proof of the chain of custody for interchangeable items like drugs or blood needs to be more conclusive. *Id.*

In the case at bar, the gray zippered pouch and the brown glass vials introduced into evidence were identified as the items taken from Bates and submitted to the crime laboratory. Both Shanks and Estes described the methamphetamine as off-white. While Shanks described the methamphetamine as powder and Estes described it as granular, Estes clarified the discrepancy, testifying that he saw no difference between describing something as granular and describing something as powder. While a bag

containing more methamphetamine was missing at trial, this fact does not diminish Estes's identification of the pouch and vials as what he seized from Bates, Shanks's identification of the pouch and vials as what she received at the laboratory, and the similarity of Estes's and Shanks's description of the pouch, the vials, and the methamphetamine. Further, the bag of methamphetamine disappeared only after Shanks tested the substances. The disappearance does not suggest that the items were tampered with prior to being tested. And while the person who transported the substance to the crime laboratory was deceased, that fact does not suggest that there was a significant possibility that the items tested were not the same as those seized from Bates. Consequently, the trial court did not abuse its discretion when it admitted into evidence the items submitted by the State.

III.

BATES'S CLAIM THAT THE METHAMPHETAMINE WAS NOT IN A USABLE AMOUNT IS MERITLESS.

At trial, Kathy Shanks, a forensic chemist with the Arkansas State Crime Laboratory, testified that she examined two brown glass vials each containing off-white powder weighing a total of 0.4489 grams containing methamphetamine hydrochloride and dimethyl sulfone. (R. 178) Citing *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), Bates argues that the State failed to establish that the portion of the white powdery substance identified as methamphetamine was a usable amount of methamphetamine.

Bates's argument is without merit. Unlike *Harbison*, where the controlled substance was in an amount too small to be either used or measured, there was a measurable amount of methamphetamine present in the case at bar. *See Sinks v. State*,

44 Ark. App. 1, 4, 864 S.W.2d 879, 881 (1993). In fact, the amount present (including any adulterants or diluents) (448.9 milligrams) was more than double the amount necessary (200 milligrams) to create a rebuttable presumption that Bates possessed the methamphetamine with the intent to deliver. *See* Ark. Code Ann. § 5-64-401 (a)(1)(i) (Repl. 1997); Ark. Code Ann. § 5-64-401(d) (Repl. 1997). Furthermore, the methamphetamine was packaged in two separate vials in a zippered pouch, thus providing evidence that there were at least two separate usable amounts of methamphetamine. *Compare Embry v. State*, 50 Ark. App. 245, 247-48, 905 S.W.2d 73, 74-75 (1995). Such evidence established that there was a usable amount of methamphetamine.

IV.

THE TRIAL COURT PROPERLY SENTENCED BATES TO PROBATION.

Bates was found guilty of the crimes of possession of methamphetamine and possession of marijuana. During the sentencing phase of the trial, Bates requested that the jury be instructed on the alternative sentence of probation. The trial court approved the instruction prepared by Bates and instructed the jury accordingly. The trial court instructed the jury as follows:

> The defendant may also contend that he should receive the alternative sentence of probation. You may recommend that he receive this alternative sentence, but you are advised that your recommendation will not be binding on the Court.
>
> If you recommend the alternative sentence, you will so indicate on the following form:

> And this form reads: We the Jury, having found John Michael Bates, guilty of possession of methamphetamine find that he should be placed on probation for a period of _____. Under this blank is typed in parenthesis not less than three (3) years not more than (10) years, with a signature line for the foreman, for Mr. Cooper.
>
> Even if you do recommend the alternative sentence, however, you must still complete the other verdict form.

(R. 358-60, 363-64)

After deliberation, the jury returned the completed the verdict forms. The first form provided: "We, the Jury, having found John Michael Bates guilty of methamphetamine fix his sentence at a fine of ten thousand dollars, ($10,000.00)." (R. 368-69) The second provided: "And we, the Jury, having found John Michael Bates guilty of possession of methamphetamine find that he should be placed on probation for a period of five (5) years." (R. 369) The trial court sentenced Bates to five years' probation. (R. 401) On appeal, Bates argues that the trial court exceeded its authority in sentencing him to five years' probation.

Under the bifurcated trial procedure set forth in Ark. Code Ann. § 5-4-103 (Repl. 1997), and Ark. Code Ann. § 16-97-101 (Supp. 1997), the jury fixes punishment following the penalty phase of the trial, and the pursuant to § 16-97-101(4), the jury may recommend an alternative sentence such as suspension or probation. *See Higgins v. State*, 326 Ark. 1030, 1037, 936 S.W.2d 740, 744 (1997). However, as provided by § 16-97-101(4), the recommendation is not binding on the trial court. The actual assessment of probation is a matter that lies within the discretion of the trial court. *Higgins*, *supra*.

The jury recommended that Bates should be placed on probation for a period of five years. The trial court exercised its discretion and placed Bates on probation. Thus, Bates was sentenced in accordance with the applicable statutory provisions. Though Bates argues that the trial court exceeded his authority in placing Bates on probation, he cites no authority to support his argument. This Court will not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well-taken. *Williams v. State*, 325 Ark. 432, 439, 930 S.W.2d 297, 300 (1996). Consequently, his argument is meritless.

CONCLUSION

For the foregoing reasons and authorities cited, John Michael Bates's appeal is without merit. The State respectfully asks this Court to affirm.